Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE AMERICAN BIBLE SOCIETY, *et al.*,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 14, 1998

QUESTION PRESENTED

In April 1997, the Fifth Circuit sanctioned Petitioners for appealing the district court's refusal to dismiss this action pursuant to the Charitable Gift Annuity Antitrust Relief Act of 1995, which Congress passed to bar Respondent's claim that Petitioners violated the Sherman Act by fixing rates of return for charitable gift annuities. In July 1997, Congress responded by passing the Charitable Donation Antitrust Immunity Act of 1997, which "replace[d]" the 1995 Act "with language drafted in broader terms, so as to ensure that the provision will be interpreted by the courts in a manner which will achieve the goals of the 1995 Act." H.R. Rep. No. 146, 105th Cong., 1st Sess., at 3 (1997). In December 1997, this Court vacated the Fifth Circuit's decision and remanded the case for reconsideration in light of the 1997 Act. *American Bible Society v. Richie*, 118 S. Ct. 596 (1997).

On remand, the Fifth Circuit reversed the order denying Petitioners' motion to dismiss but "reimpose[d]" sanctions, stating that it "d[id] not agree" that it was "obliged to 'decide according to existing law' the issue of the frivolousness of [this] appeal" and rejecting as "unpersuasive" Petitioners' contention that sanctions are improper in cases of first impression.

Against this background, Petitioners present a single question for review:

> Whether the Fifth Circuit abused its discretion under FED. R. APP. P. 38, which allows a court of appeals to impose sanctions when it "determines that an appeal is frivolous," by sanctioning the prevailing appellants in this meritorious and successful appeal presenting dispositive issues of first impression?

PARTIES TO THE PROCEEDING

Petitioners are The American Bible Society, The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, American Leprosy Missions, Inc., The Lutheran Church-Missouri Synod, The Texas District, Lutheran Church-Missouri Synod, The Lutheran Foundation of Texas, Baptist Foundation of Texas, American Baptist Foundation, American Baptist Foreign Mission Society, The Evangelical Lutheran Church in America, General Conference Corporation of Seventh-Day Adventists d/b/a General Conference of Seventh-Day Adventists, Loma Linda University, University of Colorado Foundation, Inc., The American Council on Gift Annuities, Inc., Planned Giving Resources, Prerau & Teitell, Planned Giving Services, Inc., d/b/a Planned Giving Services, and Hay/Huggins Company, Inc., which were Defendants-Appellants in the Court of Appeals. Respondent Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, was Plaintiff-Appellee in the Court of Appeals.

The other parties to the proceedings in the Court of Appeals were Defendants-Appellants United Church of Christ, Southern Baptist Convention, Good Shepherd Home Foundation, Mount Holyoke College, Smith College, Vassar College, St. Olaf College, Wittenberg University, Anderson University, Inc., d/b/a Anderson University, Northwestern University, The Salvation Army, a New York Corporation, The Salvation Army, a Georgia Corporation, The Salvation Army, a California Corporation, The Salvation Army, an Illinois Corporation, Gray, Plant, Mooty, Mooty & Bennett, and Appellant Dan Morales, as Attorney General of the State of Texas.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners has any parent or subsidiary companies.

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Petitioners respectfully request a writ of certiorari to review the June 12, 1998, order of the United States Court of Appeals for the Fifth Circuit sanctioning Petitioners under FED. R. APP. P. 38.

OPINIONS BELOW

The opinion of the Court of Appeals, PA 1-8, is reported at 143 F.3d 937. The prior opinion of the Court of Appeals, PA 9-29, is reported at 110 F.3d 1082. The opinion of the district court, PA 30-42, is reported at 943 F. Supp. 685.

JURISDICTION

The Fifth Circuit entered judgment on June 12, 1998, and denied rehearing on September 15, 1998. PA 43-45, 46-47. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves the application of FED. R. APP. P. 38, which provides that, "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

STATEMENT OF THE CASE

This case arises from Respondent's claim that charities violated the Sherman Act by conspiring to fix rates of return for charitable gift annuities. Although the Fifth Circuit rendered judgment dismissing that claim with prejudice, a live controversy remains concerning the Fifth Circuit's order sanctioning Petitioners $15,000.00 for bringing this meritorious and successful appeal.

1. Charitable Gift Annuities.

The House Report on the Charitable Gift Annuity Antitrust Relief Act of 1995, Pub.L. No. 104-63, 109 Stat. 687 (1995), succinctly describes charitable gift annuities and

the role of the American Council on Gift Annuities, Inc., [hereinafter, "the Council"] in developing annuity rates:

> A charitable gift annuity is a fundraising instrument defined and regulated under section 501(m)(5) of the Internal Revenue Code. A person who enters into a gift annuity agreement with a religious, charitable or educational institution makes a gift to the institution and receives a fixed income for life. Since the value of the gift received is more than the property transferred to the donor, a bargain sale has occurred, and the difference in values is deductible to the donor. 26 U.S.C. § 1011(b).
>
> The annuity rate applied to the value of the gift is the critical element in ensuring that the transaction will result in a meaningful gift to the charity. The American Council on Gift Annuities, a non-profit organization representing more than 1,500 charitable organizations and institutions, provides technical assistance to its members in determining appropriate annuity rates. The rates recommended by the Council are based on actuarial studies of mortality experience among annuitants and a conservative projection of the rate of income to be earned on invested reserve funds. They are computed to produce an average "residuum" or gift to the organization of between 40 and 60 percent of the amount originally donated under the agreement. Consequently, the rates are lower than and are not in competition with any rates offered commercially.

H.R. Rep. No. 336, 104th Cong., 1st Sess. at 2 (1995). The Council promotes the use of its rates because "it protects the fiscal integrity of the charity" and "ensures that donative intent rather than financial gain motivates the choice of recipient." *Ibid.* To accomplish their work, the Council and its sponsor charities rely on the assistance of attorneys, accountants, actuaries, and consultants.

2. Proceedings and Disposition Below.

In December 1994, Dorothy Ozee, the predecessor in interest to Respondent Boyd L. Richie, filed this class action in the United States District Court for the Northern District of Texas, invoking jurisdiction under 15 U.S.C. §§ 15 and 28 U.S.C. §§ 1331 & 1337 and seeking treble damages under Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 & 26. Ozee, then Richie, claimed that the Council's practice of recommending uniform rates of return for charitable gift annuities issued by charities under 26 U.S.C. § 501(m)(5) was an agreement to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In November 1995, Congress reacted to Richie's claim by passing the Charitable Gift Annuity Antitrust Relief Act of 1995 [hereinafter, "the 1995 Act"], which provided that "it shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) that are exempt from taxation under section 501(a) of such Code to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities." Pub. L. No. 104-63, § 2, 109 Stat. 687, 687 (1995). According to the House Report, the 1995 Act provided a "complete defense" to Richie's price-fixing claim by protecting not only the conduct of charities in using agreed rates in issuing charitable gift annuities, but also the Council's conduct in "publi[shing] . . . actuarial tables or annuity rates for use in issuing gift annuities" and the conduct of "attorneys, accountants, actuaries, consultants, and others . . . when assisting in the issuance of a charitable gift annuity or the setting of charitable annuity rates." H.R. Rep. No. 336 at 4, 6.

In December 1995, Petitioners filed a motion to dismiss Richie's antitrust claim pursuant to the new statute.

Richie responded by moving for leave to file a new complaint alleging that the Council and some of its sponsors had fraudulently obtained their tax-exempt statuses and thus were not "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" within the meaning of

the 1995 Act. In support of his motion, Richie argued that the 1995 Act protected only rate-setting pacts among "bona fide" 501(c)(3) organizations and did not protect agreements involving both "exempt" and "non-exempt" entities.

In reply, Petitioners argued that Richie's effort to evade dismissal was futile. In the 1995 Act, as elsewhere, they argued, Congress used the phrase "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" as a shorthand reference to tax-exempt organizations recognized as such by the IRS and not as a factual element to be proven in court.[1] In addition, they showed that Congress clearly intended the 1995 Act "to extend to" non-501(c)(3) entities such as "attorneys, accountants, actuaries, consultants, and others . . . when assisting in the issuance of a charitable gift annuity or the setting of charitable annuity rates." H.R. Rep. No. 336 at 6. Finally, they explained that reading the 1995 Act to differentiate between rate-setting agreements involving only "exempt" entities and rate-setting agreements including "non-exempt" entities would advance neither tax policy nor antitrust policy.

In September 1996, the court granted Richie leave to file his new complaint and denied Petitioners' motion to dismiss. PA 30-42. Rejecting Petitioners' contentions, the court held that the 1995 Act protected only those proven in court to be "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" and that any defendant proven to be so described and so exempt would nevertheless lose the protection of the 1995 Act if it participated in a rate-setting agreement with a "non-exempt" entity. *Id.* at 34-37. Reading the 1995 Act to grant an affirmative defense to particular parties rather than to limit the substantive reach of the Sherman Act, the court held that each defendant seeking the Act's protection had to plead and prove (i) that

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[1]Petitioners cited twenty-two federal statutes (other than tax statutes) and thirty federal regulations (other than tax regulations) that refer to charities as organizations that are "described in section 501(c)(3)" and "exempt from taxation under section 501(a)."

it was "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" and (ii) that every entity with which it allegedly conspired was so described and so exempt. *Id.* at 37-38. Apparently overlooking Richie's longstanding allegation that non-501(c)(3) attorneys and actuaries had participated in the alleged conspiracy, however, the court surmised that each charity's exemption under the 1995 Act would likely turn on the legitimacy of the Council's tax-exempt status and ordered the parties to begin discovery regarding that issue. *Id.*

In October 1996, Petitioners appealed the order denying their motion to dismiss. Noting that, under the district court's interpretation of the 1995 Act, the participation of non-501(c)(3) attorneys and actuaries in the alleged rate-setting conspiracy would bar dismissal of Richie's claim regardless of the Council's tax-exempt status, Petitioners argued under the *Cohen* doctrine that the district court's order conclusively determined their claimed right to an immunity from suit under the antitrust laws and was effectively unreviewable on appeal from a final judgment. In the alternative, Petitioners sought a writ of mandamus, arguing that, absent immediate review under the *Cohen* doctrine, the denial of their motion to dismiss would be an abuse of discretion for which there would be no adequate remedy by appeal.

On the merits, Petitioners renewed their argument that reading the 1995 Act to differentiate between rate-setting agreements involving only "exempt" entities and rate-setting agreements including "non-exempt" entities would advance neither tax policy nor antitrust policy. *See id.* at 48-66. They explained that the 1995 Act immunized the alleged conspiracy among "exempt" and "non-exempt" entities by immunizing the only aspect of the purported conspiracy that could have produced price-fixing liability in the absence of the Act: the agreement of two or more charities to use the same rates for issuing gift annuities. *See id.* They also challenged the district court's conclusion that charities bore the burden to plead and prove the application of the 1995

Act as an affirmative defense, arguing that Richie bore a burden to plead and prove an antitrust violation falling outside the scope of the 1995 Act. *See id.* at 57-58 n.4.

The House and Senate sponsors of the 1995 Act soon joined Petitioners in urging reversal. *See* PA 67-69. As *amici curiae*, United States Representative Henry J. Hyde, United States Senator Christopher J. Dodd, and ten other members of Congress filed a brief confirming Congress' intent to protect so-called "hybrid" conspiracies by "clearly provid[ing]" in the 1995 Act "that the antitrust laws do not apply to ***any*** 'use' by charities of the . . . [Council's] . . . suggested rates." *See id.* at 68 (emphasis added). Two weeks later, the District Judge sent a letter to the Fifth Circuit conceding that he might have erred in holding that bona fide charities would lose the Act's protection by joining rate-setting agreements involving "non-exempt" entities:

> I wrote that there [was] an issue of whether an exempt entity conspiring with a nonexempt entity would . . . vitiate the exemption. . . . [A]t first blush [Richie's] position seemed correct. After reading more cases and further consideration of the arguments I would now say I am not so sure of [Richie's] position. (If . . . relief . . . is denied I would welcome an advisory opinion.)

Id. at 75. The court apparently realized that reading the 1995 Act to protect only "exempt" entities contravened Congress' clearly expressed intent that the Act "extend to" the "attorneys, accountants, actuaries, consultants, and others" that Richie had added as defendants in August 1995, four months before Congress passed the 1995 Act. *See* H.R. Rep. No. 336 at 6.

In April 1997, the Fifth Circuit dismissed Petitioners' appeal for lack of jurisdiction. Holding that Petitioners could not "reap [the] benefits" of the 1995 Act because it "cover[ed] only agreements between '2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26'" and, thus, "d[id] not reach conspiracies involving both exempt and non-

exempt entities," PA 17, the court concluded that the order denying Petitioners' motion to dismiss did not finally resolve a legal question separate from the merits of Richie's antitrust claim, *id.* at 18. The court further held that mandamus was unwarranted because Petitioners had shown no clear and indisputable right to dismissal. *Id.* at 20-21.

The court also sanctioned Petitioners $15,000.00 for prosecuting a frivolous appeal. *Id.* at 27-29. Without addressing (a) the Petitioners' argument that the 1995 Act protected the alleged "hybrid" conspiracy by immunizing its only putatively anticompetitive aspect: the agreement of two or more charities to use the same annuity rates, (b) the House Report's statement that Congress intended the 1995 Act "to extend to attorneys, accountants, actuaries, consultants, and others," (c) the congressional *amici's* reminder that Congress intended the 1995 Act to protect "any" use of Council rates by charities, or (d) the District Judge's concession that he might have erred with respect to "hybrid" conspiracies, the court held that sanctions were warranted because the court's interpretation of the 1995 Act was "obvious" and "not arguable." *Ibid.*

In July 1997, Congress responded with the Charitable Donation Antitrust Immunity Act of 1997 [hereinafter, "the 1997 Act"], which amended the 1995 Act to provide that "the antitrust laws . . . shall not apply to charitable gift annuities" and that "any person subjected to any legal proceeding . . . under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct." Pub. L. No. 105-26, 111 Stat. 241 (1997). Section 3 of the 1997 Act directed that the "Act, and the amendments made by th[e] Act, shall apply with respect to all conduct occurring before, on, or after the date of the enactment of th[e] Act and shall apply in all . . . judicial

actions pending on or commenced after th[at] date . . . ." *Id.* The House Report on the 1997 Act stated that Congress retroactively amended the 1995 Act in this fashion because the district court's order and the Fifth Circuit's decision "indicate[d] that the Charitable Gift Annuity Antitrust Relief Act of 1995 [wa]s not being interpreted as broadly as it was intended by Congress." H.R. Rep. No. 146, 105th Cong., 1st Sess. at 3 (1997).

In August 1997, Petitioners sought certiorari, arguing that Congress' enactment of the 1997 Act and the Fifth Circuit's abuse of its discretion under FED. R. APP. P. 38 justified review. In December 1997, the Court granted the writ, vacated the judgment, and remanded the case for reconsideration in light of the 1997 Act. *See American Bible Society v. Richie*, 118 S. Ct. 596 (1997), [hereinafter, "*American Bible Society I*"].

In June 1998, the Fifth Circuit issued a new decision. This time, the court properly "reverse[d] the order denying [Petitioners'] motions to dismiss" Richie's antitrust claim. PA 6. Remarkably, however, the court "reinstate[d] the sanctions" this Court vacated six months earlier. *Id.* at 3.

In "reimpos[ing] the sanctions," the Fifth Circuit relied on the reasoning of its prior, vacated opinion. *See id.* at 6-7. The court stated simply that it "d[id] not agree" that, "under *United States v. Schooner Peggy*, 1 Cranch 103, 109 (1801), [it was] obliged to 'decide according to existing law' the issue of the frivolousness of [this] appeal." *Id.* The court also rejected as "unpersuasive" Petitioners' contention that *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), bars sanctions in cases of first impression. *Id.* at 7.

Believing that the order reimposing sanctions conflicts not only with *Schooner Peggy*, *American Bible Society I*, and *McKnight*, but also with three decisions of the Fifth Circuit, Petitioners timely suggested rehearing *en banc* to resolve the intracircuit conflict and maintain uniformity of decisions in the Fifth Circuit. After requesting and receiving an

answer from Richie, the Fifth Circuit denied rehearing on September 15, 1998. *Id.* at 43-45.

Remarkably, the order denying rehearing revealed that only one member of the argument panel still supports the sanctions award. According to the order, "Judge Reavley would not have imposed sanctions but deferred to the judgment of the other judges," and Judge Garza "dissent[ed] from [the] denial of rehearing," citing *American Bible Society I.* *Id.* at 45. Thus, it now appears that only Judge Smith, the presiding judge, believes that it was appropriate to reimpose sanctions against prevailing appellants in this case of first impression.

REASONS TO GRANT THE WRIT

Three reasons warrant review of the Fifth Circuit's unprecedented order sanctioning prevailing appellants for bringing this meritorious and successful appeal presenting important issues of first impression. First, the Fifth Circuit's conclusion that FED. R. APP. P. 38 authorizes sanctions in cases of first impression conflicts directly with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), and with several decisions of the United States Courts of Appeals, including three decisions of the Fifth Circuit. Second, the Fifth Circuit's decision to judge the alleged frivolity of this appeal by reference to the 1995 Act rather than the 1997 Act conflicts with this Court's decision in *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801), which requires federal courts to decide cases according to existing laws, and with the Court's decision in *American Bible Society v. Richie*, 118 S. Ct. 596 (1997) (per curiam), which directed the Fifth Circuit to reconsider this case in light of the 1997 Act. Third, the Fifth Circuit's determination that this appeal was frivolous when filed because the 1995 Act "obvious[ly]" did "not reach conspiracies involving both exempt and non-exempt entities" is a gross abuse of discretion justifying an exercise of the Court's supervisory power.

1. **The Decision to Impose Sanctions in this Case of First Impression Conflicts with this Court's Decision in *McKnight v. General Motors* and with Twenty Years of Circuit Court Precedent.**

As filed in 1996, this appeal turned on three questions. The first was whether the district court erred in concluding that Petitioners bore the burden to plead and prove the applicability of the 1995 Act as an affirmative defense. The second was whether the district court erred in concluding that the 1995 Act did not protect rate-setting agreements involving so-called "non-exempt" entities. The third was whether the 1995 Act provided a complete immunity from suit, including a right not to participate in discovery or trial. If Petitioners were correct in asserting that each of these questions should be answered in the affirmative, then the order denying their motion to dismiss Richie's price-fixing claim was not only erroneous, but also appealable. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-47 (1993) (because Eleventh Amendment provides complete immunity from suit in federal court, including right not to participate in discovery or stand trial, order denying motion to dismiss on Eleventh Amendment grounds is immediately appealable); *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1040 (5th Cir.) (because state-action exemption provides complete immunity from suit rather than mere defense to liability, order denying motion to dismiss antitrust claims on state-action grounds is immediately appealable), *cert. denied,* 119 S. Ct. 444 (1998).

Before the Fifth Circuit issued its original, vacated decision in this case, no appellate court had ever decided any of the three issues on which this appeal then turned. Accordingly, the Fifth Circuit's "reimposition" of sanctions based on its conclusion that this appeal was frivolous when filed conflicts with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), and with several other decisions barring appellate sanctions in cases of first impression.

A. For Twenty Years, the Courts of Appeals Have Barred Sanctions in Cases of First Impression.

Twenty years ago, the District of Columbia Circuit erected a *per se* bar against appellate sanctions in cases of first impression, holding in *Asai v. Castillo*, 593 F.2d 1222 (D.C. Cir. 1978), that sanctions were improper where the D.C. Circuit "had not previously addressed" the issue presented. 593 F.2d at 1225. As the Seventh Circuit would later explain in *Overnite Transportation Company v. Chicago Industrial Tire Company*, 697 F.2d 789 (7th Cir. 1983), imposing sanctions in cases of first impression "would have a profound chilling effect upon litigants and . . . interfere with the presentation of meritorious legal questions . . . ." 697 F.2d at 795.

In the fifteen years following *Asai*, all of the courts that faced the question agreed with the D.C. Circuit that appeals are not sanctionable unless foreclosed by controlling circuit precedent. *See, e.g., Stebco Inc. v. United States*, 916 F.2d 556, 558 (9th Cir. 1990) ("Because the reviewability of a district court's decision regarding venue in a §7429 proceeding is a question of first impression in this circuit, the government's attempt to appeal is not sanctionable conduct."); *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 n. 5 (11th Cir.) (refusing sanctions where "appeal present[ed] an issue of first impression" in Eleventh Circuit), *cert. denied*, 490 U.S. 1107 (1989); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 749, 761 (1st Cir. 1988) (refusing sanctions where appeal presented "important issues of first impression" in First Circuit); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988) ("Given the previously unresolved state of the law in this Circuit concerning the question of appellate jurisdiction in consolidated actions, it would be improper to award sanctions against a party whose appeal raise[d] this issue for the first time."); *Overnite Transportation*, 697 F.2d at 794 (appeal was not frivolous where issues "had never previously been litigated under the Interstate Commerce Act").

By the end of 1993, the Fifth Circuit had rejected at least three requests for sanctions on the ground that the allegedly frivolous appeals were not foreclosed by circuit precedent. *See Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1174 (5th Cir. 1993) ("Because the issue regarding the FCRA was novel to this Court, we decline to impose sanctions on appeal."); *Ehm v. Amtrak Bd. of Directors*, 780 F.2d 516, 518 (5th Cir. 1986) ("reject[ing]" sanctions "demand as inappropriate," because "[t]he issue presented by [the] appeal, *i.e.*, the propriety of a dismissal for failure to post a costs bond, involve[d] a novel procedural issue on which there ha[d] been no prior Fifth Circuit decision"); *Adult Film Ass'n v. Thetford*, 776 F.2d 113, 115 (5th Cir. 1985) (denying appellee's request for sanctions because, "[a]lthough it [could] be argued that [the appellant] knew or should have known that the district court's denial of his motion for default judgment was not appealable as a final order, no published Fifth Circuit opinion so stated"); *see also Coghlan v. Starkey*, 852 F.2d 806, 811 n.8 (5th Cir. 1988) (per curiam) (observing in dictum that, "[o]f course, sanctions are inappropriate if the appeal presents an issue of first impression.").

B. In *McKnight*, this Court Raised the Bar Against Sanctions in Cases of First Impression.

In 1994, this Court raised the bar against appellate sanctions even higher, holding in *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), that an appeal is not sanctionable unless foreclosed by a decision of ***this*** Court. Specifically, the Court held in *McKnight* that the Seventh Circuit's award of $500 in appellate sanctions was "not proper" insofar as it was based on a conclusion that the appeal "was foreclosed by ***circuit*** precedent." 511 U.S. at 659 (emphasis added). The Court reasoned that, although the court of appeals had correctly denied relief on the merits pursuant to Seventh Circuit authority, imposing sanctions was improper because "[f]iling an appeal was the only way [the] petitioner could preserve the issue pending a possible

favorable decision by ***this*** Court." *Ibid.* (emphasis added). Thus, under *McKnight*, an appeal is not "frivolous" within the meaning of FED. R. APP. P. 38 unless it is foreclosed by a controlling decision of this Court.[2]

C. The Fifth Circuit's Departure From Binding Precedent Merits Review.

The Fifth Circuit's decision in June 1998 to "reimpose" sanctions based on its vacated conclusion in April 1997 that Petitioners' appeals were frivolous when filed in October 1996 clearly conflicts both with *McKnight* and with twenty years of precedent in the courts of appeals and plainly merits review.

Although the Fifth Circuit was correct to conclude that "[t]he specter of sanctions deters . . . the pursuit of untested claims that are worthless on their face[s]," PA 7, it is equally true that "the specter of sanctions" can deter the pursuit of claims that are worthwhile and, thus, "interfere with the presentation of meritorious legal questions," *Overnite Transportation*, 697 F.2d at 795. Further, imposing sanctions in a case of first impression can unduly expose the judicial temperament of the sanctioning court to criticism in the event that this Court -- or Congress -- later rejects the analysis underlying its finding of frivolity. Thus, the Fifth Circuit's decision to abandon the prudential bar against appellate sanctions in cases of first impression in favor of an arbitrary, I-know-it-when-I-see-it test for arguments deemed "worthless on their face[s]" raises important procedural issues meriting this Court's attention on writ of certiorari.

Moreover, even if a new rule allowing sanctions in cases of first impression were not sufficiently troubling to merit review, the Fifth Circuit's refusal to follow this Court's decision in *McKnight* would nonetheless justify the writ.

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[2]Since the Court decided *McKnight*, the Sixth Circuit has joined the courts of appeals that have refused to impose appellate sanctions in cases of first impression. *See Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213 (6th Cir. 1997) (refusing sanctions where "central issue was one of first impression").

"If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). In this case, however, the Fifth Circuit ignored Petitioners' repeated citation to this Court's directly applicable decision in *McKnight*, *see* PA 78, 79-80, and followed inapposite dictum from *United States v. Alexander*, 981 F.2d 250 (5th Cir. 1993), a pre-*McKnight* decision vacating Rule 11 sanctions as an abuse of discretion. *See id.* at 7. A failure to correct that detour "into terra incognita," *Hopwood v. Texas*, 84 F.3d 720, 722 (5th Cir. 1996) (Politz, C.J., dissenting from denial of rehearing *en banc*), could only encourage similar losses of direction in the future.

2. **The Decision to Judge the Alleged Frivolity of this Appeal by Reference to the 1995 Act Conflicts with this Court's Decisions in *United States v. Schooner Peggy* and *American Bible Society v. Richie*.**

Congress' authority to correct what it perceives to be a misinterpretation of a federal statute through retrospective legislation such as the Immunity Act is beyond question:

> Congress . . . has the power to amend a statute that it believes [the courts] have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product.

Rivers v. Roadway Exp., Inc., 511 U.S. 298, 313 (1994).

Since 1801, when this Court decided the seminal case of *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801), it has been equally clear that federal courts must honor Congress' constitutional instructions to apply new law to pending cases. *See* 1 Cranch at 109, 2 L.Ed. at 51 ("[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the

rule which governs, the law ***must*** be obeyed, or its obligation denied. If the law be constitutional, . . . no court . . . can contest its obligation. . . . In such a case the court ***must*** decide according to existing laws . . . .") (emphasis added). "When a new law makes clear that it is retroactive, an appellate court ***must*** apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (citing *Schooner Peggy*; emphasis added).

Under *Schooner Peggy* and its progeny, the courts are obliged to heed Congress' instructions that the 1997 "Act, and the amendments made by th[e] Act, shall apply with respect to ***all conduct*** occurring before, on, or after the date of the enactment of th[e] Act," including all conduct at issue in this case, "and shall apply in ***all . . . judicial actions*** pending on or commenced after th[at] date," including this action. Pub. L. No. 105-26, § 3, 111 Stat. 241, 242 (1997) (emphasis added).

In *American Bible Society I*, Richie sought to avoid the rule of *Schooner Peggy*, asserting that, "[e]ven if the Court were inclined to grant certiorari, vacate, and remand, it should not do so with respect to the award of sanctions" because "the award was justified for many reasons, and nothing in the [1997] Act changes the analysis to be applied in assessing appellate sanctions." Respondent's Brief in Opposition at 15, *American Bible Society v. Richie*, 118 S. Ct. 596 (1997).

By vacating the entirety of the Fifth Circuit's April 1997 judgment and directing the Fifth Circuit to reconsider this case in light of the 1997 Act, this Court's order in *American Bible Society I* followed the time-honored rule of *Schooner Peggy* and required the Fifth Circuit to decide this entire case, including the sanctions issue, in light of the 1997 Act.

On remand, the Fifth Circuit conceded that the 1997 Act controlled its disposition of the merits of this appeal. *See* PA at 5. The court also conceded that the 1997 Act gave it appellate jurisdiction where it had previously -- although, in

Petitioners' view, erroneously -- held that none existed. *See id.* at 6 & n.5. Without citing a shred of authority, however, the Fifth Circuit stated simply that it "d[id] not agree" that it was obliged to decide the sanctions issue according to existing law. *Id.* at 6-7.

The Fifth Circuit's conclusion that the Congress and this Court intended the 1997 Act to govern the question whether Petitioners' appeal is meritorious but not the question whether it is frivolous finds support neither in law nor in logic. Thus, by refusing to apply the 1997 Act to the sanctions issue and instead "reinstat[ing] the sanctions" based on its previously vacated analysis of the superseded 1995 Act, *see* PA 3, 6-7, the Fifth Circuit contravened both the general rule of *Schooner Peggy* and the specific mandate of *American Bible Society I*. Accordingly, the court's decision to judge the alleged frivolity of this appeal in light of the 1995 Act independently merits review on writ of certiorari.

3. The Determination that this Appeal Was Frivolous When Filed Is an Abuse of Discretion Justifying an Exercise of this Court's Supervisory Power.

As Petitioners have previously argued in this Court, as well as in the Court of Appeals, the plain language of the 1995 Act immunized Richie's alleged conspiracy among "exempt" and "non-exempt" entities by immunizing the only aspect of the purported conspiracy that could have produced price-fixing liability in the absence of the Act: the alleged agreement of two or more charities to use the same rates for issuing gift annuities. *See* Petition for Writ of Certiorari at 21-27, *American Bible Society v. Richie*, 118 S. Ct. 596 (1997); PA 48-65. But, even if the Fifth Circuit were correct in reaching its now moot conclusion that the 1995 Act "d[id] not reach conspiracies involving both exempt and non-exempt entities," PA 17, the court's determination that its reading of the 1995 Act was "obvious" and "not arguable" would nevertheless constitute an abuse of discretion warranting an exercise of this Court's supervisory power.

Standing alone, the District Judge's concession that, "[a]fter reading more cases and further consideration of the arguments," even he was "not so sure of [Richie's] position" concerning "hybrid" conspiracies, PA 75, should have precluded the Fifth Circuit's determination that its interpretation of the 1995 Act was "obvious" and "not arguable." Importantly, however, the District Judge's letter "welcom[ing] an advisory opinion" on the "hybrid" conspiracy issue did not stand alone. The Fifth Circuit's determination of frivolity was further belied by: (a) the unrebutted textual argument that the 1995 Act immunized the alleged "hybrid" conspiracy by immunizing its only putatively unlawful aspect: the agreement of two or more charities to use the same annuity rates, (b) the statement in the 1995 House Report that Congress intended the 1995 Act "to extend to attorneys, accountants, actuaries, consultants, and others," (c) the confirmation of the congressional *amici* that Congress intended the 1995 Act to protect "any 'use'" of Council rates by charities, and (d) the statement in the 1997 House Report that the Fifth Circuit's April 1997 decision "indicate[d] that the Charitable Gift Annuity Antitrust Relief Act of 1995 [wa]s not being interpreted as broadly as it was intended by Congress," and (e) the November 8, 1996, decision of the Fifth Circuit motions judge that the appeal was sufficiently meritorious and urgent to be expedited on the court's docket. In light of this support for Petitioners' contentions, which the Fifth Circuit wholly ignored, the determination that this appeal was frivolous when filed is a gross abuse of discretion calling for an exercise of the Court's supervisory power.

CONCLUSION

For the reasons stated above, Petitioners respectfully request a writ of certiorari to review the June 12, 1998, order of the United States Court of Appeals for the Fifth Circuit sanctioning Petitioners under FED. R. APP. P. 38. In the event that the Court deems argument to be unnecessary, the Court should grant the writ and summarily reverse the

sanctions in accordance with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam).

December 14, 1998

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Supreme Court, U.S.
FILED

98 977 DEC 14 1998

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE AMERICAN BIBLE SOCIETY, *et al.*,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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December 14, 1998

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OPINION OF THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
No. 96-11332 FILED
No. 96-11439 JUN 12 1998
CHARLES R. FULBRUGE III
CLERK

DOROTHY L. OZEE, etc., et al.
Plaintiffs,

BOYD L. RICHIE,
as Guardian of the Estate of LOUISE T. PETER,
on Behalf of LOUISE T. PETER Individually
and on Behalf of All Others Similarly Situated,
Plaintiff-Appellee,

VERSUS

THE AMERICAN COUNCIL ON GIFT ANNUITIES, INC., Individually and as Successor to the COMMITTEE ON GIFT ANNUITIES, an Unincorporated Association, THE LUTHERAN CHURCH-MISSOURI SYNOD, THE LUTHERAN FOUNDATION OF TEXAS, BAPTIST FOUNDATION OF TEXAS, GRAY, PLANT, MOOTY, MOOTY & BENNETT, GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, d/b/a GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, ANDERSON UNIVERSITY, INC., d/b/a ANDERSON UNIVERSITY, MOUNT HOLYOKE COLLEGE, GOOD SHEPHERD HOME FOUNDATION, NORTHWESTERN UNIVERSITY, UNIVERSITY OF COLORADO FOUNDATION, INC., THE SALVATION ARMY, A NEW YORK CORPORATION, THE SALVATION ARMY, A GEORGIA CORPORATION, THE SALVATION ARMY, A CALIFORNIA CORPORATION, THE SALVATION ARMY, AN ILLINOIS CORPORATION,

UNITED CHURCH OF CHRIST, PLANNED GIVING SERVICES, INC., d/b/a PLANNED GIVING SERVICES, PLANNED GIVING RESOURCES, HAY/HUGGINS COMPANY, INC., PRERAU & TEITELL, VASSAR COLLEGE, AMERICAN BAPTIST FOREIGN MISSION SOCIETY, ST. OLAF COLLEGE, WITTENBERG UNIVERSITY, EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE MOODY BIBLE INSTITUTE OF CHICAGO, d/b/a MOODY BIBLE INSTITUTE, THE AMERICAN BIBLE SOCIETY, and AMERICAN LEPROSY MISSIONS, INC.,

Defendants-Appellants,

DAN MORALES,
Appellants.

In re AMERICAN COUNCIL ON GIFT ANNUITIES, INC., et al.,

Petitioners

Appeals from the United States District Court for the Northern District of Texas

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ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

An annuitant's guardian sued a collection of charities and universities, alleging that they conspired to fix rates of return on charitable gift annuities. We dismissed defendants' appeals for want of jurisdiction and imposed sanctions. *See Ozee v. American Council on Gift Annuities, Inc.*, 110 F.3d 1082 (5th Cir. 1997). The Supreme Court vacated and remanded for further consideration in light of

the Charitable Donation Antitrust Immunity Act of 1997, Pub. L. No. 105-26, 111 Stat. 241 (1997) (to be codified at 15 U.S.C. § 37-37(a)). *See American Bible Soc'y v. Richie*, 118 S. Ct. 596 (1997). We now dismiss plaintiff's antitrust claims, reinstate the sanctions, grant the motion to intervene, and remand for determination of whether any state law claims survive.

I.

The facts and proceedings are set forth at length in our prior opinion. *See* 110 F.3d at 1088-90. To summarize briefly: The defendants were accused of suppressing competition in the market for charitable gift annuities. A purchaser of a charitable gift annuity receives a fixed stream of income in exchange for his "donation" to the charity; the annual payout is referred to as the charitable gift annuity rate, which rate the defendants were accused of fixing.

Dorothy Ozee (later replaced by Boyd Richie) sued the charities on behalf of Louise Peter, an elderly woman who purchased these annuities. She asserted a claim under § 1 of the Sherman Act and added supplemental Texas state law claims. The defendants, having lost their initial motion to dismiss, persuaded Congress to pass a bill aimed at squelching this suit. The Charitable Gift Annuity Antitrust Relief Act of 1995 ("Relief Act") provided that

> it shall not be unlawful under any of the antitrust laws, or under a State law similar to any of the antitrust laws, for 2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

15 U.S.C. § 37(a) (1996).[1] The defendants collectively filed a motion to dismiss; defendant Northwestern University filed a motion for summary judgment. The district court denied these motions, *see Richie v. American Council on Gift*

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[1] The Texas legislature passed parallel legislation to foreclose Richie's state law claims.

Annuities, 943 F. Supp. 685 (N.D. Tex. 1996), and the defendants appealed.

We concluded that we lacked jurisdiction to entertain the appeal under the collateral order doctrine. Our reasoning was based on the fact that Richie's amended complaint alleged a conspiracy involving organizations not exempt under § 501(c)(3); the allegations therefore were not covered by the plain language of the Relief Act, which did not encompass "hybrid" conspiracies between exempt and non-exempt organizations. *See Ozee*, 110 F.3d at 1091-92. We sanctioned the defendants under FED. R. APP. P. 38 for filing a frivolous appeal, noting that in pursuing their collateral appeal, the defendants had blithely ignored the nature of the claim and the basis of the district court's ruling. We ordered the defendants and Northwestern University to pay Richie $15,000 in partial compensation of his costs and attorneys' fees. *See Ozee*, 110 F.3d at 1097.[2]

II.

The defendants sought relief from our decision in both Congress and the Supreme Court. Congress acted first, once again enacting a statute targeting the instant lawsuit. The Charitable Donation Antitrust Immunity Act of 1997 ("Immunity Act"), signed into law on July 3, 1997, amended the Relief Act. The section entitled "Immunity" provides:

> [A]ny person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws, or any State law similar to any of the antitrust laws, on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities or charitable remainder trusts shall have immunity from suit under the antitrust laws,

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[2]Excluded from the sanctions order was Texas Attorney General Dan Morales, who sought to intervene as of right and whose appeal was not frivolous.

> including the right not to bear the cost, burden, and risk of discovery and trial . . . .

15 U.S.C. § 37(b) (1998). The statute also directs, more generally, that "the antitrust laws, and any State law similar to any of the antitrust laws, shall not apply to charitable gift annuities or charitable remainder trusts." 15 U.S.C. § 37(a). Finally, Congress provided that the Immunity Act have retroactive application to all judicial actions pending on its enactment date. *See* Pub. L. No. 105-26, § 3, 111 Stat. 241, 247 (1997). After enactment of the statute, the Supreme Court granted the defendants' petitions for writs of certiorari, vacated the judgment, and remanded for further consideration in light of the Immunity Act. *See American Bible Soc'y v. Richie*, 118 S. Ct. 596 (1997).

III.

Richie concedes that the Immunity Act applies to the instant case. We agree. The Immunity Act amends the Relief Act by affording a far broader exemption to organizations engaging in anticompetitive behavior related to the issuance or payment of charitable gift annuities. Specifically, the Immunity Act expands the Relief Act's protections to include anticompetitive practices by non-exempt entities or by participants in a hybrid conspiracy. The defendants are covered by the plain language of the amended statute.

Richie urges us to postpone the inevitable and remand to the district court for consideration of the new law. As authority, he cites *Concerned Citizens v. Sills*, 567 F.2d 646, 649-50 (5th Cir. 1978), where we observed that "[b]ecause the factual basis for the district court's holding was eliminated within days after final judgment was entered, we conclude that the judgment should be vacated and the case remanded for reconsideration in light of the facts as they now stand." Concerned that intervening events might have deprived the court of jurisdiction, we directed the district court "to determine whether plaintiffs still desire to engage in any arguably protected activity which they likely would forego in the absence of the relief they seek." *Id.* at 651. As

this language suggests, *Sills* is not on point, because there a remand was necessary for additional fact-finding.[3]

Here, by contrast, there are no additional facts that await development.[4] The Immunity Act erases the distinction between exempt and non-exempt organizations—a distinction that might otherwise preclude our exercise of jurisdiction under the collateral order doctrine.[5] But as explained above, the Immunity Act moots the factual questions that did exist, leaving us with an easily-resolved question of law.[6] Accordingly, we reverse the order denying the motions to dismiss and render a judgment of dismissal. We remand to the district court for the limited purpose of determining whether any state law claims survive.

IV.

That leaves the matter of sanctions. The defendants argue that, under *United States v. Schooner Peggy*, 1 Cranch 103, 109 (1801), we are obliged to "decide according to existing law" the issue of the frivolousness of their appeal. They contend that because the Supreme Court vacated the prior judgment, there is no frivolous "original appeal"

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[3] *See also Spiess v. C. Itoh & Co. (Am.), Inc.*, 687 F.2d 129, 129 (5th Cir. 1982) (on remand from Supreme Court) (remanding to district court because "[r]esolution of . . . remaining issues may involve several factual determinations that have not yet been made").

[4] *See In re Holloway*, 955 F.2d 1008, 1015 (5th Cir. 1992) ("We see no compelling reason to subject the parties and the courts to further delays and expense by remanding the case for application of the proper legal standard to the undisputed facts.").

[5] *See Ozee*, 110 F.3d at 1092 n.11 ("Even were we to assume *arguendo* that the Relief Act legalizes conspiracies between exempt and non-exempt entities, there would not be an appealable immunity issue, as the bases on which Richie has challenged the defendants' § 501(c)(3) determinations are factual.").

[6] *Cf. Martin v. Memorial Hosp.*, 86 F.3d 1391, 1396-97 (5th Cir. 1996) (holding that a denial of a claim of state action immunity that turns on a question of law is an appealable "final decision" for purposes of 28 U.S.C. § 1291).

remaining, and it would be improper for us to impose "new" sanctions based on their current—and, in light of existing law, meritorious—appeal.

We do not agree. That Congress subsequently amended the law to conform to the defendants' interpretation in no way justifies their earlier conduct. We measure the frivolity of an appeal by the law existing at the time, not the law as it evolves or is amended in subsequent years. Defendants point to language from the Immunity Act's legislative history suggesting that this court did not interpret the Relief Act "as broadly as it was intended by Congress." *See* H.R. REP. NO. 146, 105th Cong., 1st Sess. 3 (1997). Yet, even if we assume that the defendants' interpretation harmonized with after-expressed congressional intent, their appeal was frivolous under the plain statutory language that existed at the time.

The defendants' contention that they should not be penalized for pursuing an appeal in a case of first impression is unpersuasive. While it is true that we have called sanctions "inappropriate" when the case is one of first impression, *see Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1174 (5th Cir. 1993) (per curiam), the novelty of a legal issue merely cuts against, but does not preclude, the imposition of sanctions. *See United States v. Alexander*, 981 F.2d 250, 253 (5th Cir. 1993) ("Of course, a claim that is utterly insupportable may be sanctionable even if the circuit has not addressed the issue."). Were this not the case, a patently frivolous but novel legal argument—"novel," perhaps, because no litigant would dream of bringing it with a straight face—would not be sanctionable.

The specter of sanctions deters not only the raising of claims that have been considered and rejected repeatedly, but also the pursuit of untested claims that are worthless on their face. We decline to adopt a rule of "first-impression immunity" and, accordingly, we now reimpose the sanctions.[7]

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[7] We have no need to revisit several of the motions presented in the

V.

The motion to dismiss plaintiff's antitrust claims is GRANTED, and a judgment of dismissal of that claim is hereby RENDERED. The order denying Morales's motion to intervene as of right is REVERSED, and the case is REMANDED for purposes of determining whether any state law claims survive. Pursuant to FED. R. APP. P. 38, the defendants and Northwestern University are sanctioned $15,000 for their frivolous appeals and are hereby ORDERED to remit that sum to Richie.

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first appeal. The defendants have withdrawn their petition for writ of mandamus. And given that we have granted the defendants' motion to dismiss, Richie's motion to dismiss the appeal is denied. Morales's appeal, however, is not moot, because he may wish to participate in any proceedings, on remand, regarding whether any state law claims survive. Accordingly, we once again reverse the order denying Morales's motion to intervene as of right, and we grant that motion. *See Ozee*, 110 F.3d at 1094-96.

PRIOR OPINION OF THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS

No. 96-11332

FILED
APR 9 1997

CHARLES R. FULBRUGE III
CLERK

DOROTHY L. OZEE,
acting individually as attorney in fact for Louise T. Peter, and as next friend for Louise T. Peter, on behalf of Louise T. Peter individually and all others similarly situated;
Plaintiff,

BOYD L. RICHIE,
guardian of the estate of Louise T. Peter,
Plaintiff-Appellee,

VERSUS

THE AMERICAN COUNCIL ON GIFT ANNUITIES, INC., individually and on behalf of its members, sponsors and all other similarly situated to them, and as successor to The Committee on Gift Annuities, an unincorporated association, et al.,
Defendants-Appellants,

DAN MORALES, Attorney General of Texas,
Appellant.

* * * * * * * * * * * * * * * * * * * *

No. 96-11439

In re AMERICAN COUNCIL ON GIFT ANNUITIES, INC., et al.,
Petitioners.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This consolidated case consists of an appeal by the various above-listed defendants from the district court's denial of a motion to dismiss, a separate appeal by Northwestern University challenging the denial of summary judgment, a petition by the defendants for a writ of mandamus, an additional appeal by Texas Attorney General Dan Morales from the denial of his motion to intervene as of right, and a motion by Boyd Richie to dismiss the defendants' and Northwestern's appeals. For the reasons stated below, we dismiss the defendants' and Northwestern's appeals for want of jurisdiction, deny the petition for mandamus, reverse the denial of intervention, and impose sanctions on appeal.

I.

This litigation stems from charitable donations by Louise Peter, a ninety-six-year-old woman, to the Lutheran Foundation of Texas, one of the many defendants. Peter, who suffers from dementia and Alzheimer's disease, inherited a substantial fortune from her brother late in life. Her guardian, Boyd Richie, alleges that soon thereafter, the leaders of the Lutheran Church-Missouri Synod began unscrupulously pressuring Peter to let them manage her money. After resisting for years, she eventually invested $1.7 million with the Lutheran Foundation of Texas. Approximately $1.5 million of this went into a revocable management trust and a charitable remainder unitrust; the remaining $200,000 went to buy charitable gift annuities, the financial products that are the epicenter of this lawsuit.

Charitable gift annuities are hybrids of altruism and capitalism. To purchase one, the donor or "annuitant" writes a check to a charitable organization. The charity, in

return, promises to pay the annuitant a fixed stream of income for the remainder of his life. Precisely how much the annuitant will receive per year depends primarily on the size of the "donation" and the annuitant's age—the older he is, the more he receives, because the older he is, the less the time is during which the charity expects to have to pay the annuity.

As with bonds, the annual payout is expressed as a percentage, which is referred to as the charitable gift annuity rate. Unlike with bonds, however, the principal on which this "interest" is being paid becomes the property of the charity when the check is handed over. In other words, the annuitant trades a "donation" to a charity for a guaranteed stream of income that continues as long as he lives.[1]

In many respects, then, charitable gift annuities are quite similar to the commercial annuities sold by life insurance companies. As with commercial annuities, an annuitant who outlives his actuarial life expectancy stands to reap a substantial profit, the gift portion of the "donation" notwithstanding. The difference is that charitable gift annuities also provide the annuitant a large tax deduction and the satisfaction of having given to the charity of his choice, advantages that the plaintiffs in this case contend make charitable gift annuities competitive with other financial products.

Enter the principal defendant, the American Council on Gift Annuities, Inc. (the "Council"). According to Richie, the Council was formed years ago to suppress competition

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[1]For tax purposes, the Internal Revenue Service ("IRS") considers the initial transfer that starts the charitable gift annuity to be a "bargain sale," i.e., a sale of property for less than its fair market value. The difference between actuarially determined fair market value and the transfer price is considered a gift, and the gift portion of the transfer is required to be at least 10% of the total. Thus the IRS breaks the transaction in two: Part of the transfer is deemed to have purchased a normal commercial annuity that yields taxable income, and part is a tax-deductible charitable gift.

among charities in setting gift annuity rates, which competition apparently would have had the undesirable effect of causing potential donors to shop for the best rate. The Council purportedly sets rates that it warns charities not to exceed, actively monitors compliance, and lobbies against government regulation of the charitable gift annuity industry. Richie thus alleges that the Council is the hub of a vast, sinister price-fixing conspiracy comprising charities across the country.

Dorothy Ozee, Peter's grand-niece and next friend, filed suit in federal district court alleging (1) that the Council and numerous other organizations (hereinafter, "the defendants") had violated § 1 of the Sherman Act by agreeing to fix rates of return on charitable gift annuities; and (2) a number of supplemental Texas state law claims, including illegal sale of annuities and breach of fiduciary duty. The defendants moved to dismiss the antitrust claims on the ground that charitable donations do not constitute "trade or commerce" within the meaning of the Sherman Act.[2] The district court denied the motion to dismiss and granted partial summary judgment in Peter's favor on one state law claim of illegal sale of annuities. A Texas state court later appointed Richie guardian of Peter's estate, so Ozee's name was dropped from the suit, and Richie was substituted as the named plaintiff.

Perhaps recognizing that the denial of their first motion to dismiss did not bode well for their chances of success on the merits, the defendants decided to attack their problem from another angle: They persuaded both Congress and the Texas Legislature to pass bills specifically designed to squelch this suit. The federal bill, which the President signed into law on December 8, 1995, was entitled the

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[2]Section 1 of the Sherman Act provides in relevant part that " [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1.

Charitable Gift Annuity Antitrust Relief Act (the "Relief Act"), and provided that

> it shall not be unlawful under any of the antitrust laws, or under a State law similar to any of the antitrust laws, for 2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

15 U.S.C. § 37 (a). Congress made the Relief Act explicitly retroactive. Charitable Gift Annuity Antitrust Relief Act of 1995, Pub.L. No. 104-63, § 4, 109 Stat. 687, 688 (1995). The Texas Legislature passed parallel legislation designed to foreclose Richie's state law claims by retroactively allowing nonprofit organizations to both sell annuities and operate trusts. *See* TEX. BANKING CODE ANN. art. 342-1113(3) (Vernon Supp. 1997);[3] TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Vernon Supp. 1997);[4] TEX. INS. CODE ANN. art. 1.14-1A § 2(a)-(b) (Vernon Supp. 1997).[5]

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[3]"The provisions of this chapter shall not affect or apply to . . . (3) a corporation serving as trustee of a charitable trust as provided by Article 2.31, Texas Non-Profit Corporation Act (Article 1396-2.31, Vernon's Texas Civil Statutes)." TEX. BANKING CODE ANN. art. 342-1113, -1113 (3) (Vernon Supp. 1997).

[4]"A corporation that is described by Section 501(c)(3) or 170(c), Internal Revenue Code of 1986, or a corresponding provision of a subsequent federal law, may serve as the trustee of a trust: (1) of which the corporation is a beneficiary; or (2) benefiting another organization described by one of those sections of the Internal Revenue Code of 1986, if the service as trustee is in furtherance of the purposes for which the corporation was formed." TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Vernon Supp. 1997) (footnote omitted).

[5]"Sec. 2. (a) The issuance of a qualified charitable gift annuity does not constitute engaging in the business of insurance in this state. (b) A charitable gift annuity issued before September 1, 1995, is a qualified charitable gift annuity for purposes of this article and Article 1.14-1 of this code, and the issuance of that charitable gift annuity does not constitute engaging in the business of insurance in this state." TEX. INS. CODE ANN. art. 1.14-1A § 2(a)-(b) (Vernon Supp. 1997).

Armed with this new legislation, the defendants filed another motion to dismiss and, in the case of defendant Northwestern University ("Northwestern"), a motion for summary judgment. In response, Richie both challenged some of the defendants' § 501(c)(3) exemptions and amended his complaint to allege a price-fixing conspiracy between entities that fit the Relief Act's exemption and entities that do not.[6] The district court issued thirty-five orders, the most important of which, dated September 30, 1996, denied the defendants' motion to dismiss, Northwestern's motion for summary judgment, and Morales's motion to intervene as of right. *See Richie v. American Council on Gift Annuities*, 943 F. Supp. 685 (N.D. Tex. 1996). It is from this second refusal to dismiss that the defendants now appeal.

In addition to the defendants' collective appeal from the refusal to dismiss, Northwestern individually appeals the denial of summary judgment. Morales brings a separate interlocutory appeal, arguing that he should have been allowed to intervene as of right under FED. R. CIV. P. 24(a). The defendants (again, collectively) petition for a writ of mandamus, requesting dismissal of both the state and the federal claims on the grounds that the district court abused its discretion by (1) refusing to grant the second motion to dismiss, (2) asserting jurisdiction to consider whether defendants meet the Relief Act's requirements for antitrust exemption; (3) refusing to grant the first motion to dismiss; and (4) refusing to enter summary judgment on the Texas state law issues. Finally, Richie moves this court to dismiss the defendants' appeals on numerous grounds, most notably for want of appellate jurisdiction.

II.

A.

The central issue is this court's jurisdiction to hear the appeal. The statute codifying the final judgment rule, 28 U.S.C. § 1291, provides that "[t]he courts of appeals shall

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[6]For convenience, we henceforth refer to such conspiracies as "hybrid" conspiracies.

have jurisdiction of appeals from all final decisions of the district courts of the United States." Appeal is thereby precluded from decisions that are "tentative, informal, or incomplete," as well as from "fully consummated decisions" that are "but steps towards final judgment in which they will merge." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As the refusal to dismiss is obviously not a "final decision," *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 824 (1986) (citing *Fluor Ocean Servs. v. Hampton*, 502 F.2d 1169, 1170 (5th Cir. 1974)), the only way the defendants can hope to assert jurisdiction is through the collateral order doctrine.

The collateral order doctrine permits appeal of non-final decisions that "fall in that small class [of interlocutory decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. The doctrine thus allows review of orders that (1) conclusively determine the disputed question; (2) resolve an issue that is completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgement. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *see also Cohen*, 337 U.S. at 545-47. As its stringent requirements indicate, the collateral order doctrine is not to be applied liberally. Rather, the doctrine "is 'extraordinarily limited' in its application." *Pan E. Exploration Co. v. Hufo Oils*, 798 F.2d 837, 839 (5th Cir. 1986) (citation omitted). Moreover—and particularly apposite to this case—appealability under the collateral order doctrine must be determined "without regard to the chance that the litigation might be speeded, or a 'particular injustice' averted by a prompt appellate court decision." *Digital Equip.*, 511 U.S. at 868.

As a general matter, the refusal to dismiss an action under FED. R. CIV. P. 12(b)(6) is not appealable.[7] Recognizing the predicament in which these decisions place them, the defendants argue that the Relief Act gives them an immunity from suit and that the refusal to dismiss denied them that immunity, as denials of motions to dismiss on the basis of qualified or absolute immunity frequently are appealable as collateral orders.[8]

The defendants' immunity arguments completely miss the mark, however. After the Relief Act was passed, Richie amended his complaint to allege that some of the defendants had procured their 26 U.S.C. § 501(c)(3) tax-exemption determination letters by fraud, and Richie added some plainly non-charitable defendants so as to allege a conspiracy between § 501(c)(3) exempt entities and non-exempt entities.[9] Accordingly, the order denying the motion to dismiss rested on two grounds: (1) That Richie has at least stated a claim as to the defendants he claims are non-exempt; and (2) that he also states a claim insofar as he alleges a conspiracy between exempt and non-exempt organizations.

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[7]*See, e.g., Morin v. Caire*, 77 F.3d 116, 119 (5th Cir. 1996) ("Ordinarily, this court does not have jurisdiction over the denial of a Rule 12(b)(6) motion to dismiss for no cause of action, because such an order is interlocutory in nature."); *Holloway v. Walker*, 765 F.2d 517, 525 (5th Cir.) (same), *cert. denied*, 474 U.S. 1037 (1985). *Accord Briggs & Stratton v. Local 232 Int'l Union*, 36 F.3d 712, 714 (7th cir. 1994) ("To the extent the union wants us to review the district court's failure to dismiss the case outright, it hasn't a leg to stand on.,), *cert. denied*, 115 S. Ct. 1998 (1995); *Hill v. City of New York*, 45 F.3d 653, 663 (2d Cir. 1995); *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

[8]*See Digital Equip.*, 511 U.S. at 871; *Williams v. Collins*, 728 F.2d 721, 724-26 (5th Cir. 1984); *see also Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982).

[9]Besides the obviously eleemosynary organizations, Richie's ever-expanding list of defendants includes a number of law firms, insurance companies, and commercial banks that apparently are associated with the administration of charitable gift annuities.

This second ground is important, for even assuming that the Relief Act creates an immunity from suit rather than a substantive rule of decision on the merits (a question we do not reach), the defendants may not reap its benefits. As the Relief Act covers only agreements between "2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 . . .," its plain language does not reach conspiracies involving both exempt and non-exempt entities.

The defendants argue that the statute means something other than what it says, citing a House report suggesting that the exemption was intended to extend to attorneys, consultants, and other professionals retained by a § 501(c)(3) entity. See H. R. REP. No. 104-336 (1995), reprinted in 1995 U.S.C.C.A.N. 632, 637. We find this suggestion thoroughly unpersuasive. As we stated above, the plain terms of the Relief Act cover conspiracies by § 501(c)(3) organizations only; had Congress wished to exempt hybrid agreements, it easily could have done so. As the plain language of the statute is unambiguous, we need not concern ourselves with its legislative history, which appears not to support the defendants' proposition, in any event.[10] *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989); *United States v.*

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[10]Even were we to look beyond the plain language of the Relief Act, our conclusion that hybrid conspiracies are outside its reach would still be supported by the rule of forfeiture. Under this rule, entities normally exempt from the antitrust laws lose their exemption when they conspire with non-exempt entities. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 782-84 (1993), the Court's most recent pronouncement on this subject, the Court drew a distinction between status-based and conduct-based exemptions, finding the rule of forfeiture applicable to the former but not necessarily to the latter. The exemption created by the Relief Act is based on both status ("persons described in section 501(c)(3)") and conduct ("to use, or to agree to use"), and is thus much more like the Capper-Volstead Act, which has both status and conduct elements, than it is like the McCarran-Ferguson Act, which creates a purely conduct-based exemption. Status is the key, and because Richie is alleging a conspiracy in which some entities have the requisite status-based exemption and some do not, the rule applies.

Barlow, 41 F.3d 935, 942 (5th Cir.1994), *cert. denied*, 115 S. Ct. 1389, *and cert. denied*, 115 S. Ct. 1804, *and cert. denied*, 115 S. Ct. 1804 (1995); *Dillon v. Mississippi Military Dep't*, 23 F.3d 915, 919 n.8 (5th Cir. 1994).

It should be evident, from the above, that because the refusal to dismiss was predicated on Richie's claims of non-exempt defendants and a hybrid conspiracy involving them, the matters it addressed were neither conclusively determined nor separate from the merits of the case. To the contrary, the district court went out of its way to state that it would reconsider the defendants' claims of exemption as soon as there was sufficient evidence to do so. Given that the ruling was based on the possibility of a hybrid conspiracy, we need not consider whether the Relief Act grants § 501(c)(3) organizations some sort of immunity or right not to stand trial. It follows that because the denial of the motion to dismiss did not actually require a finding of no immunity, it is not a collateral order, and we lack jurisdiction to entertain the appeal.[11]

B.

The charitable defendants protest that Richie may not challenge their exempt status, because the district court lacks jurisdiction to reconsider the IRS's determination that they are § 501(c)(3) entities. In effect, they contend that their letters from the IRS finding them to be § 501(c)(3) entities for tax purposes grant an unassailable, irrevocable status as exempt organizations under the Relief Act, and that no one may litigate this issue. Even were we to agree with this, the fact that Richie has alleged a conspiracy

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[11]Even were we to assume *arguendo* that the Relief Act legalizes conspiracies between exempt and non-exempt entities, there would not be an appealable immunity issue, as the bases on which Richie has challenged the defendants' § 501(c)(3) determinations are factual. *See Hale v. Townley*, 45 F.3d 914, 918 (5th Cir. 1995) ("An appellate court has jurisdiction to review an interlocutory denial of qualified immunity only to the extent that it 'turns on an issue of law.'") (quoting *Mitchell*, 472 U.S. at 530); *Feagley v. Waddill*, 868 F.2d 1437, 1439 (5th Cir. 1989) (same).

between exempt and non-exempt entities would deprive us of jurisdiction to hear this appeal. Our want of jurisdiction, moreover, precludes us from addressing the question of the § 501(c)(3) determination.

III.

Northwestern University separately appeals the denial of its motion for summary judgment, arguing that it has incontrovertibly demonstrated that it is exempt under the Relief Act. As with the defendants' motion to dismiss, Northwestern's motion was denied by the September 30, 1996, memorandum opinion and order on the bases described above. *See Richie,* 943 F. Supp. at 687-88 n.1. Also as with the motion to dismiss, the order specifically stated—in boldface, no less—that it was denying Northwestern's motion without prejudice. The court went out of its way to note that further discovery was necessary before it could "fairly and correctly rule" on the summary judgment motions before it.

Ordinarily, a denial of summary judgment is an unappealable interlocutory order. *Aldy v. Valmet Paper Mach.,* 74 F.3d 72, 75 (5th Cir.), *cert. denied*, 117 S. Ct. 68 (1996); *Schaper v. City of Huntsville*, 813 F.2d 709, 713 (5th Cir. 1987). The denial of Northwestern's motion falls squarely within this general rule, for the obvious lack of a conclusive and unreviewable determination renders the collateral order doctrine inapplicable. To the extent Northwestern argues that the district court disallowed it an immunity defense, its argument is foreclosed by the same factual issues that precluded the motion to dismiss: Richie's allegations that some of the defendants are non-exempt and that exempt entities conspired with non-exempt ones. As we previously have held, "if disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." *Feagley,* 868 F.2d at 1439. In short, then, we lack jurisdiction to hear Northwestern's claims for largely the same reasons that we lack jurisdiction to hear the defendants'.

IV.

In addition to the above appeals, the defendants[12] also petition for a writ of mandamus, alleging that the district court abused its discretion in (1) refusing to grant the second motion to dismiss; (2) asserting jurisdiction to consider whether defendants meet the Relief Act's requirements for antitrust exemption; (3) refusing to grant the first motion to dismiss; and (4) refusing to enter summary judgment on the Texas state law issues. The relief they seek is dismissal with prejudice of Richie's federal and state claims.

Most of the petition simply recycles the arguments of defendants' appeal in the substantially stricter mandamus context. Mandamus is "an extraordinary remedy for extraordinary causes," *United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979) (en banc), and is not intended as a "substitute for appeal," *In re American Airlines*, 972 F.2d 6 05, 608 (5th Cir. 1992), *cert. denied*, 507 U.S. 912 (1993). It is not justified merely because "hardship may result from delay or from an unnecessary trial," *In re Fibreboard Corp.*, 893 F.2d 706, 707 (1990). Rather, the writ issues only where the district court has committed a "clear abuse of discretion" or engaged in "conduct amounting to 'usurpation of power.'" *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989). To succeed, the defendants must show (1) that they lack adequate alternative means to obtain the relief they seek and (2) that their right to issuance of the writ is "clear and indisputable." *Mallard*, 490 U.S. at 309; *American Airlines*, 972 F.2d at 608; *Fibreboard*, 893 F.2d at 707.

This the defendants cannot show. As to the first two challenged actions—the refusal to grant the second motion to dismiss and the assertion of jurisdiction over the defendants' status as exempt entities—our discussion above explains why defendants' right to the relief they seek is anything but "clear and indisputable."

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[12]Although they are technically petitioners with respect to this portion of the case, we will continue to refer to the defendants as defendants in the interests of clarity.

They fare little better on the refusal to grant the first motion to dismiss, which was predicated on a finding that the conduct challenged in this case is "trade or commerce" within the meaning of the Sherman Act. As Richie points out, the "exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction." *United States v. Brown Univ.*, 5 F.3d 658, 666 (3d Cir. 1993).

The purchasers of charitable gift annuities pay money and receive benefits in return: the annuity, substantial tax advantages, and the satisfaction of having given to charity. As the IRS recognizes, at least part of the transaction is undoubtedly commercial, and the transaction as a whole is a far cry from the sort of "antithesis of commercial activity" that it need be in order to fall outside the scope of the Sherman Act. *Brown*, 5 F.3d at 666.

Nor can the defendants succeed in their arguments regarding the summary judgment on Richie's state law claims. Twenty days after the district court entered that summary judgment, the governor signed into law two pieces of legislation that purport to "clarify" the Texas Insurance Code, the Free Enterprise and Antitrust Act, and the Deceptive Trade Practices Act, so as to leave no doubt that charities need not be licensed insurance companies in order to issue charitable gift annuities. [13] Much as it might want to, however, the legislature cannot reverse a federal district court. The defendants, the Texas legislature, and the two state courts that have construed this legislation have consistently vacillated as to whether H.B. 3104 merely "clarified," or instead retroactively changed the law. They appear to want it both ways: They would like retroactivity to get rid of Richie's suit, and "clarification" so as not to run afoul of the "open courts" provision of TEXAS CONST. art. 1, § 13.

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[13]See TEX. BANKING CODE ANN. art. 342-1113, -1113 (3) (Vernon Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Vernon Supp. 1997); TEX. INS. CODE ANN. art. 1.14-1A, § 2(a)-(b) (Vernon Supp. 1997).

Fortunately, we need not delve into matters of state law, federalism, and separation of powers to resolve this issue, for the defendants have failed to demonstrate that they meet the first requirement for mandamus relief, the unavailability of alternative means. The summary judgment they complain of is addressable both through certified appeal under 28 U.S.C. § 1292(b) and through direct appeal after final judgment. *See In re El Paso Elec. Co.*, 77 F.3d 793, 795 (5th Cir. 1996). The grant of summary judgment was neither an abuse of discretion nor an "usurpation of power, and whatever right petitioners might have to relief on the merits is far from being "clear and indisputable." The petition for writ of mandamus is denied.

V.

We have jurisdiction over the appeal of the denial of intervention as of right under FED. R. CIV. P. 24(a), because such orders are appealable collateral orders. *See Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc) (citing *Ceres Gulf v. Cooper*, 957 F. 2d 1199, 1202 n.5 (5th Cir. 1992)). Our standard of review is *de novo*. *Id.* at 995.

Morales's brief bitterly recounts how he has been left out of this case. As Attorney General, he is charged with representing the public interest in charitable trusts. Under TEX. PROP. CODE ANN. § 123.003 (Vernon 1995), interested parties in proceedings involving charitable trusts must give him notice of the proceeding by sending him "a certified copy of the petition or other instrument initiating the party's involvement in the proceeding." Richie did this, and Morales received his notice on January 9, 1995.

After that, however, things appear to have gone downhill. Morales apparently was not served with most of the pleadings, and he claims that he was unaware of most of the activity in this case until April 1995, at which time he learned that Richie had filed the motion for partial summary judgment on his state law claims. On April 18, 1995, Morales moved for leave to intervene permissively, and the district court denied his request shortly thereafter. He filed two motions to reconsider this ruling on May 16, 1995, and September 25, 1995, respectively.

On October 17, 1995, Morales filed a second motion for leave to intervene, this time both permissively and as of right. On September 30, 1996, nearly a year later, the district court denied this motion as moot, for the grant of partial summary judgment on Richie's state law claims by then had disposed of all the issues in which the court believed Morales might have an interest. Morales now appeals, challenging only the denial of his motion to intervene as of right.

A.

Morales argues that the district court erred because he meets all the requirements for rule 24(a) intervention: He timely applied; he has an interest in the charitable gift annuities and trusts that are the subject of this suit; disposition of the case without him would impair his ability to protect that interest; and his interest is not adequately represented by the existing parties. See FED. R. CIV. P. 24(a); *Sierra Club v. Espy*, 18 F. 3d 1202, 1204-05 (5th Cir. 1994); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 24.03[l][b], at 24-23 (3d ed. 1997). The test is conjunctive; failure to meet any one of these requirements means that Morales may not intervene as a matter of right. *Sierra Club*, 18 F.3d at 1205 (citing *Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1287 (5th Cir.), *cert. denied*, 484 U.S. 817 (1987)). We agree, however, that he meets each of these criteria.

The first part of the intervention calculus is whether Morales's motion was timely filed. The test for timeliness under Rule 24(a) requires us to consider

> (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene;
>
> (2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case;

(3) The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and

(4) The existence of unusual circumstances militating either for or against a determination that the application is timely.

Edwards, 78 F.3d at 1000. *Accord* 6 MOORE, *supra*, § 24.21[3], at 24-71. As we stated in *Sierra Club*,

> [This] analysis is contextual; absolute measures of timeliness should be ignored. The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention where no one would be hurt and greater justice could be attained.

18 F.3d at 1205 (citations and internal quotations omitted).

Richie attacks Morales's motion on the ground that it is untimely, citing the district court's rejection of his earlier motion to intervene permissively as untimely. Because the first motion was untimely when filed on April 18, 1995, Richie reasons, the second motion cannot possibly have been timely when filed on October 17 of that year.

This is incorrect. We have consistently held that a "district court should apply a more lenient standard of timeliness if the would-be intervenor qualifies for intervention under section (a) [of Rule 24] than if he qualified for intervention under section (b)." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266 (5th Cir. 1977); *see also McDonald*, 430 F.2d at 1073. Given the difference in standards and the fact that this Court reviews timeliness *de novo*, the determination that Morales's first motion was untimely has little or no bearing on the timeliness of his second motion.

Applying the test for timeliness, we find that the first of the four factors is neutral. It does appear that Morales waited over nine months from the time that he received his statutorily mandated notice to the time that he moved to intervene as of right. Timeliness is dependent on the

surrounding circumstances, however, and we have rejected the notion that "the date on which the would-be intervenor became aware of the pendency of the action should be used to determine whether it acted promptly." *Sierra Club*, 18 F. 3d at 1206; *see also Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1209 (5th Cir. 1985). The correct measure of promptness is the extent to which the would-be intervenor delayed action after it became aware that the original parties would not protect its interests. *Sierra Club*, 18 F.3d at 1206.

Under this standard, Morales's delay was lengthy, but not nearly so lengthy as it appears at first blush. It was not until April 1995 that Richie's summary judgment motion alerted Morales to the immediate danger to his interests. He moved to intervene permissively shortly thereafter, and moved to intervene as of right a few months later, after it became apparent that the court would not permit him to do so permissively. Although his actions in moving to intervene as of right were not as prompt as they could have been, neither were they excessively tardy. The first factor is neutral.

The second factor—prejudice to the existing parties resulting from delay—weighs in Morales's favor. "[P]rejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Sierra Club*, 18 F.3d at 1206. We fail to see, and Richie has failed to point to, any way in which Morales's delayed entry into the suit will prejudice the existing parties. At most, his entry will cause only inconvenience, which does not weigh into our decision.

The third prong—prejudice to the would-be intervenor—also weighs in favor of Morales. This suit's potential for prejudice to the interests of the people of Texas is obvious. Morales's position is unique, for the people's interests are not represented by any of the existing parties. Although Morales suggests that his course of action in the litigation thus far would have paralleled that of the charitable defendants, there could quite easily be some point

in the litigation at which his interests will diverge. The fourth factor, which weighs "unusual circumstances," is neutral.

The test for timeliness is not a mathematical formula by which a court simply sums its determinations on each of the four factors to reach an answer. *Edwards*, 78 F.3d at 1004. On balance, however, we think that Morales satisfies the test and that his application was timely, particularly in light of the potential for this litigation to prejudice the interests of the people of Texas.

B.

In order to have a sufficient interest in this case to support rule 24(a) intervention, Morales also must demonstrate that he has a "direct, substantial, legally protectable interest in the proceedings." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F. 2d 452, 463 (5th Cir.) (en banc) (quoting *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970)), *cert. denied*, 469 U.S. 1019 (1984). This means that the interest he is asserting must be one that the law recognizes as his. *Id.* at 464. Rule 24(a) also requires him to demonstrate that "disposition of the action may as a practical matter impair or impede [his] ability to protect that interest."

Morales's status as the public protector of charities and charitable trusts satisfies these requirements. *See* TEX. PROP. CODE ANN. §§ 123.001-005 (Vernon 1995). There can be no serious debate that Richie's suit, if successful, would impair the ability of Texas charities to operate, at least until the charities persuade Congress or the legislature to pass additional exemptions for their conduct.

C.

Under this circuit's caselaw and FED. R. CIV. P. 24 (a), Morales also bears a "minimal" burden of showing that his interest is inadequately represented by the existing parties. *Sierra Club*, 18 F.3d at 1207 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). He need not show that the existing representation necessarily will be inadequate, but only that it "may be" so. *Id.* This prong of the rule 24(a) test sets a low standard. That he meets it is

virtually self-evident, for none of the existing defendants can claim directly to represent the interests of the citizens of Texas.

This leads us to conclude that the district court erred in denying Morales's motion to intervene as of right. The relevant portion of the September 30, 1996, order is therefore reversed.

D.

Morales's final contention is that we should reverse and render judgment on Richie's Texas state law claims. This is effectively an appeal from both the partial summary judgment against the Lutheran Foundation of Texas and the refusal to grant summary judgment for the other defendants. As such, we lack jurisdiction to hear it, and this portion of Morales's appeal is accordingly dismissed.[14]

VI.

Richie's motion to dismiss asks us to acknowledge that the defendants' appeals are frivolous and to award sanctions accordingly. Under FED. R. APP. P. 38, we may award "just damages and single or double costs to the appellee" if we determine that an appeal is frivolous. Unlike sanctions under FED. R. CIV. P. 11, rule 38 sanctions are discretionary.

The threshold consideration is frivolity. In this circuit, a frivolous appeal is either one that pursues legal points not arguable on the merits or one in which the result is obvious.[15]

We find that the defendants' and Northwestern's appeals meet this test. For all their arguments about the Relief Act

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[14]See *Resolution Trust Corp. v. United States Fidelity and Guar. Co.*, 27 F.3d 122, 125 (5th Cir. 1994) ("The general rule in the federal courts, of course, is that partial summary judgments are not appealable."); *Bodden v. Osgood*, 879 F. 2d 184, 186-87 (5th Cir. 1989); *Way v. Reliance Ins. Co.*, 815 F. 2d 1033, 1034 (5th Cir. 1987).

[15]*See Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985), *cert. denied*, 493 U.S. 818 (1989); *Coghlan v. Starkey*, 852 F. 2d 806, 810 (5th Cir. 1988) (per curiam) (stating that rule 38 sanctions are appropriate where the outcome of the appeal "is obvious from the comprehensive and decisive exposition of the law by the judge below").

creating immunity, the defendants and Northwestern have blithely ignored that Richie is alleging some of them to be non-exempt, which creates factual issues, and that he is alleging a hybrid conspiracy. The September 30, 1996, order was unambiguous on this point. Although they throw up a good smoke screen, it defies reality for the defendants to continue to argue that they can collaterally appeal the district court's ruling in the face of its true basis.

As the district court correctly noted, it has never been at issue in this case whether a *bona fide* § 501(c)(3) organization is exempt from liability under the Relief Act. Rather, the real issue has been, and continues to be, whether the defendants are genuine § 501(c)(3) organizations within the meaning of the Act, and whether any agreements they may have made meet the test for exemption. The briefs in this case are voluminous, and the pleadings filed in the district court even more so. As the district court's response to the petition for mandamus put it, "[T]he paper keeps flowing and the meter keeps running. There are 765 documents filed thus far in the district court and my docket sheet in this case rocks on for 116 pages." Yet nowhere do the defendants come to grips with the real issues.

In light of this, we deem it appropriate to assess sanctions that, though not fully compensatory of Richie's costs, are nonetheless substantial enough unequivocally to alert the defendants to the error of their ways. *See Atwood v. Union Carbide Corp.*, 850 F.2d 1093, 1094 (5th Cir. 1988) (per curiam) (assessing attorney's fees "that are more than nominal but considerably less than fully compensatory"), *cert. denied*, 489 U.S. 1079 (1989). The defendants and Northwestern shall pay to Richie $15,000 in partial compensation of his costs and attorney's fees.[16] Counsel for the defendants and Northwestern are admonished

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[16]We note, in the interest of clarity, that by "defendants and Northwestern" we do not mean to refer to Morales, who was not a defendant in the district court and whose appeal is not frivolous.

henceforth to undertake a more thorough examination of both the decision being appealed and the rules governing our appellate jurisdiction.

VII.

In summary, Richie's motion to dismiss is GRANTED, and the defendants' and Northwestern's appeals accordingly are DISMISSED. Pursuant to rule 38, the defendants and Northwestern are SANCTIONED $15,000 for their frivolous appeals and are hereby ORDERED to remit that sum to Richie. The petition for writ of mandamus is DENIED. The order denying Morales's motion to intervene as of right is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BOYD L. RICHIE, et al.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	7:94-CV-128-X
THE AMERICAN COUNCIL	§	
ON GIFT ANNUITIES, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Now before the Court are:

1) Plaintiff's February 13, 1996 Motion for Leave to File Fourth Amended Class Action Complaint;
2) Defendants' December 14, 1995 Motion to Dismiss;
3) Defendant's August 27, 1996 Renewed Motion for Relief;
4) Defendant Northwestern University's January 26, 1996 Motion for Summary Judgment[1];

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[1]The Court has also read and considered Defendant Northwestern University's separate Reply, filed January 26, 1996, on these issues and its separate Motion, in the alternative, for Summary Judgment, also filed on January 26, 1996. References herein to "Defendants' Motion to Dismiss" include and apply to Defendant Northwestern University's Motion for Summary Judgment since it is also predicated on the new antitrust exemption. Since Defendant Northwestern University's qualification for this exemption raises material fact issues and because of the conclusory nature of its supporting affidavits, its alternative Motion for Summary Judgment is **DENIED**. See Fed.R.Civ.P. 56 and 52(c).

5) Defendant Lutheran Foundation of Texas's October 26, 1995 Motion to Reconsider the May 3, 1995 Order Granting Partial Summary Judgment; and
6) Defendant American Council on Gift Annuities's and Defendant Lutheran Church-Missouri Synod's November 22, 1995 Motion for Partial Summary Judgment on Texas Statutory Claims.

After having considered these motions and all responses, replies, and surreplies thereto, the motions are hereby **DENIED IN PART, GRANTED IN PART**, unless otherwise stated, as follows.

I.

This case involves a claim that the American Council on Gift Annuities, its members, and various other charities in the United States have been involved in a mass price-fixing conspiracy setting the maximum rates of return with regard to charitable gift annuities. In essence, the plaintiffs claim that these entities collusively fix prices to restrain competition between the various sellers of charitable gift annuities.

On December 8, 1995, the Charitable Gift Annuity Antitrust Protection Act[2] and the Philanthropy Protection Act[3] were enacted. These new federal statutes retroactively changed, not "clarified," the laws upon which Plaintiff's federal claims were (and are) based.[4] On December 14,

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[2]Pub.L. No. 104-63, 109 Stat. 687 (WESTLAW US-PL 104-63, HR 2525, December 8, 1995, Slip Copy).

[3]Pub.L. No. 104-62,109 Stat. 682 (WESTLAW US-PL 104-62, HR 2519, December 8, 1995, Slip Copy). The Court need not address the applicability of the Philanthropy Protection Act since Plaintiff s Fourth Amended Complaint abandons its claim pursuant to the Investment Company Act of 1940.

[4]If nothing else, this case has underscored in this judge's mind the wisdom of the founding fathers' decision to separate the powers of government into three distinct 'branches,' with one of those branches being an independent judiciary with life tenure to insulate judicial decisions from the pressures of political activity and public opinion. Despite all the obvious activity of lobbyists, public relations persons, and

1996, less than a week after passage of these new amendments, Defendants collectively moved the Court to dismiss[5] Plaintiff's two federal claims, as set forth in Plaintiff's Third Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(1), 12(b)(6), and 12(c) in view of these new statutory exemptions, and to remand his supplemental state-law claims.

On February 13, 1995, Plaintiff moved the Court for leave to file his Fourth Amended Class Action Complaint which, *inter alia*, would abandon his federal claim under the Investment Company Act of 1940 and his Texas Free Enterprise and Antitrust Act claim, but which would retain his other federal claim under the Sherman Act and his allegations concerning Defendants' illegal sale of annuities and operation of trust businesses. Defendants' Response to that motion argued, in part, that Plaintiff should not be permitted to amend his Complaint because its filing would be futile since Plaintiff's Fourth Amended Class Action Complaint would still fail to state a claim upon which relief can be granted in light of the newly-enacted, retroactive antitrust exemption.[6] Since, however, Defendants have not established "beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), i.e., since there still exists the possibility that Defendants will not be able to prove that they qualify for the new antitrust exemption, Defendants' Motion to Dismiss Plaintiff's Sherman Act claim pursuant to Rule 12(b)(6) must be denied. Consequently, Plaintiff's proposed amendment is not futile since his Fourth

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other assorted spin doctors, this case is not as simple and easy as many would like to believe.

[5]Defendant Northwestern also moves, in the alternative, for summary judgment on these same legal issues pursuant to Fed.R.Civ.P. 56(c).

[6]*See Avatar v. Exploration Inc. v. Chevron U.S.A., Inc.*, 933 F.2d 314, 321 (5th Cir. 1991); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980).

Amended Complaint alleges facts which could potentially state a claim, even given the new statutory exemption; therefore, his Motion for Leave to File Fourth Amended Class Action Complaint is granted in all respects.

II.

Section 2(a) of the Charitable Gift Annuity Antitrust Relief Act ("Antitrust Relief Act"), which amends state and federal antitrust laws, provides as follows:

> (a) EXEMPT CONDUCT. -- Except as provided in subsection (b)[7], it shall not be unlawful under any of the antitrust laws, or under a State law similar to any of the antitrust laws, for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) that are exempt from taxation under section 501(a) of such Code to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

The "antitrust laws" to which this provision refers are defined in § 3 of the Antitrust Relief Act, and § 4 of the Antitrust Relief Act makes this exemption retroactively applicable.

As with any statutory question, the Court begins with the language of the statute. *Kellogg v. United States (In re West Texas Marketing Corp.)*, 54 F.3d 1194, 1200 (5th Cir.), *cert. denied*, 116 S.Ct. 523 (1995). In determining a statute's plain meaning, it is assumed that, absent any contrary definition, "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Pioneer Investment Services v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (internal quotation marks omitted). As the Supreme Court has stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic*

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[7]Subsection (b) relates only to State statutes passed after the effective date of the Charitable Gift Annuity Antitrust Relief Act.

Contractors, Inc., 458 U.S. 564, 571 (1982) (internal quotation marks omitted). Where the statutory language is clear, as it is here, "the inquiry should end." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

Since Defendants maintain that "Congress used the language 'described in section 501(c)(3)' and 'exempt from taxation under section 501(a)' as a traditional shorthand reference to 501(c)(3) organizations -- not as distinct factual elements of the exemption granted by the new legislation"[8], the plain meaning of this statute is called into question. However, only if the statutory language is ambiguous are courts to proceed beyond the language as written. *Ron Pair Enterprises, Inc.*, 489 U.S. at 241. Here, the literal language of the statutory text unambiguously specifies two requirements for the Act's antitrust exemption: (1) an entity described in 26 U.S.C. § 501(c)(3) that is tax exempt under § 501(a); and (2) use of, or agreement to use, the same annuity rates with another such organization. Defendants' contention that this first requirement simply means "having a 501(c)(3) determination letter" is not the statute's plain meaning, but merely their subjective twist on the text's plain language commonly understood meaning. If it were, it could have been easily included. The Court cannot conclude that Congress meant one thing while saying another. Because the language of the new exemption is unambiguous, "the sole function of the court is to enforce it according to its terms." *Ron Pair Enterprises, Inc.*, 489 U.S. at 241 (internal quotation marks omitted).

Although floor debate may indicate that the new legislation was clearly meant to dispose of this lawsuit[9] and

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[8]Defendants' Reply at page 3.

[9]"[A]n ominous class action lawsuit in a Federal court in Texas has put American philanthropy in jeopardy. Specifically, this lawsuit disingenuously attempts to apply securities and antitrust laws meant to govern commercial enterprises to fundraising and money-management techniques of charities. This is an application of Federal law never contemplated by Congress." 141 Cong. Rec. S17828 (daily ed. November 29, 1995) (statement of Senator Pressler). Senator Pressler's message

the American public, if polled by Gallup or Harris, would probably resoundingly want to put the kibosh to this lawsuit, the Court resists the temptation to "read into" the statute what "everyone clearly intended." To do so would, in the Court's opinion, be to engage in the very sort of judicial activism that so many proponents of this legislation disdain. The Court cannot get from the legislative history what the language of the statute unambiguously denies. As the Fifth Circuit paraphrased Justice Oliver Wendell Holmes, "we do not inquire what Congress meant; we only ask what it said." *Guilzon v. C.I.R.*, 985 F. 2d 819, 823 n. 11 (5th Cir. 1993).

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has been received and the Court is acutely aware that the new legislation was directed at this suit.

The Court is also not unaware of or unsympathetic to the realities of the adverse effects this lawsuit may have on legitimate charities that do much good. All lawsuits have a negative effect on all defendants. In fact, this Court has over 400 of them, and most if not all of those defendants want their cases heard so the negative effects of their lawsuits can be removed. Nevertheless, this Court may not do what it believes is 'right,' but must do what the law explicitly requires. And, even though the Court has no doubt as to what Congress wanted to accomplish, applying what they wrote to trigger the exemption, however, is slightly more problematic.

In February, when the Court indicated that a ruling on these issues would be forthcoming in April, the Court meant what it said. Unfortunately, soon afterward, the Court was deluged with motions in the record-breaking number of cases filed this year. This time-crunch was exacerbated by the Court's criminal docket (which takes precedence), Congress's recent penchant for federalizing traditional state crimes, the hours involved in calculating sentencing guidelines, not to mention the six year vacancy of a judgeship position in the Northern District of Texas. All things considered, this case has been given exceptional attention, contrary to what is implied in footnote one of Defendants' Renewed Motion for Relief., e.g., no motion, of the hundreds of motions filed in this case, has had to be reported on the Court's six month pending motion list despite the fact that this case is only two years old and approximately half of the Court's other cases are *older*. Defendants can rest assured in the fact that the Court has not sat around staring out the window in boredom waiting for the next filing in the *Richie* matter to come in. Nonetheless, the Court will continue its efforts in the future to see that this case gets tried as soon as possible.

Furthermore, the Court must strictly construe this plain qualifying language in the § 2(a) exemption in the Antitrust Relief Act since exemptions from the antitrust laws must be construed narrowly. *E.g., Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Antitrust exemptions must be applied in a way that minimizes the risk that unprotected activity will escape remedy, thereby jeopardizing national competition policy.[10] Thus, the Court cannot treat § 2(a)'s phrases - "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" -- as "mere shorthand references" used by Congress, as Defendants urge. Instead, the Court will follow the law as written, i.e., Plaintiff's Sherman Act claim is not subject to dismissal until Defendants have proven that they qualify for the § 2(a) exemption, the same way any other law would be applied. If a Defendant can prove that it meets the new test, the legislative intent is clear that the claim should, and will, be dismissed as to that entity.

To make that determination, however, the Court must first make the necessary subsidiary findings on the factual elements of the exemption, e.g., the Court must determine whether the statutory criteria described in 501(c)(3)[11] are met for each Defendant. On this score, I.R.S. 501(c)(3) determination letters, which are administrative

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[10]See *Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11-12 (1976) (antitrust laws are "to be construed liberally, and . . . exceptions . . . are to be construed strictly."); *Federal Maritime Comm'n v. Seatrain Line, Inc.*, 411 U.S. 726, 734-35 (1973) (antitrust laws are "fundamental national policy"); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 671 (7th Cir. 1992).

[11]Section 50 1 (c)(3) provides for tax exempt status for: "corporations . . . organized and operated exclusively for religious, charitable, . . . or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation . . ."

determinations based on information supplied by applicants for such letters, do not necessarily establish that a Defendant is a bona fide organization "described in section 501(c)(3)" and "exempt from taxation under section 501(a)," which in turn would qualify a Defendant to benefit from the new antitrust exemption. *See, e.g., Geisinger Health Plan v. C.I.R.*, 985 F.2d 1210, 1214 (3d Cir. 1993); *Phi Delta Theta Fraternity v. C.I.R.*, 887 F.2d 1302, 1308 (6th Cir. 1989); 16 C.F.R. § 3.82(b) (1995); 1 C.F.R. § 315.306 (1995). The new statute makes no reference at all to an I.R.S. 501(c)(3) determination letter but rather references provisions of the Internal Revenue Code. As such, Defendants bear the burden of proving that they are "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" for the exemption to apply to them, *e.g., Seasongood v. K and K Ins. Agency,* 548 F. 2d 729, 732 (8th Cir. 1977): self-definition or self-declaration does not pass muster.

Even so, Plaintiff's Fourth Amended Complaint has alleged facts that, if proved, would defeat the new exemption, e.g., Plaintiff has alleged that the American Council on Gift Annuities ("Council"), if it has been determined to be a 501(c)(3) organization, obtained its 501(c)(3) status through material misrepresentations and omissions to the I.R.S. If true, which is how the Court is required to take allegations under a Rule 12(b)(6) motion, the Council would not be entitled to the new antitrust exemption. *Walker Process Equip. Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-77 (1965).

Additionally, if the Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception. *Hartford Fire Ins. Co. v. California*, 113 S.Ct. 2891, 2902-03 (1993). The new exemption in this case has both status-based ("persons described in section 501(c)(3) and exempt from taxation under section 501(a)") and conduct-based ("use or agreeing to use the same annuity rate" for purposes of issuing charitable gift annuities) elements similar to the Capper-Volstead exemption, 7 U.S.C.

§ 291. Even if the Rule of Forfeiture did not apply (which it does), the new exemption certainly does not exempt or otherwise authorize conspiracies with nonexempt entities.

Consequently, to avoid needless expense and delay to all other Defendants, the Court will decide the Council's exempt status before determining other Defendants' statuses. Therefore, all discovery will remain abated except as to whether the Council is entitled to the new antitrust exemption. If during dispositive motion practice the Council proves not to be exempt, then class certification issues will be subsequently addressed.[12]

III.

Defendants' contention that "this Court lacks jurisdiction to evaluate Defendants' 501(c)(3) status" is legally incorrect. (Reply at page 3) 26 U.S.C. § 7428,[13] the tax exception to the

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[12]By Order entered this same day, the Court has decertified all previously certified classes in this case.

[13]26 U.S.C. § 7428 provides in pertinent part as follows:

In a case of actual controversy involving --

> (1) a determination by the Secretary (A) with respect to the initial qualification or continuing qualification of an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2), (B) with respect to the initial classification or continuing classification of an organization as a private foundation . . ., or (C) with respect to the initial classification or continuing classification of an organization as a private operating foundation . . ., or
>
> (2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1),
>
> . . . , the United States Tax Court, the United States Claims Court, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial classification or continuing qualification or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or

Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201,[14] does not "give exclusive jurisdiction over disputes involving an organization's 501(c)(3) status to the Tax Court, the Claims Court, and the D.C. district court" as Defendants' argue at page nine of their Reply, and this Court does not lack jurisdiction to "de novo review" or otherwise litigate an entity's 501(c)(3) status to determine Defendants' eligibility for this new antitrust exemption. Neither 26 U.S.C. § 7428 nor the DJA, 28 U.S.C. § 2201, are jurisdictional statutes. Section 7428 only involves pre-assessment, pre-collection claims for declaratory relief regarding tax liability and neither creates exclusive jurisdiction nor supplants district court jurisdiction over tax refund actions. *See e.g., American Ass'n of Christian Schools Voluntary Employees Beneficiary Ass'n Welfare Plan Trust v. United States*, 850 F.2d 1510 (11th Cir. 1988) (district court found church insurance trust to not be a 501(c)(3) entity).

More to the point, neither § 7428 nor the DJA are implicated in this case. This is not an action to confer tax liability upon any of the defendants. In enacting § 7428, Congress did not limit jurisdiction to apply the Internal Revenue Code, but only limited jurisdiction to enter certain relief that would interfere with tax collection. This case merely involves a tax-status-related issue that does not implicate tax liability or the assessment and collection of

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> the Claims Court, as the cast may be, and shall be reviewable as such. . . .

[14]28 U.S.C. § 2201(a) (the Declaratory Judgment Act) states as follows:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, . . . any court of the United States, . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

taxes. Moreover, the dispute in this case that is connected with 501(c)(3) classification is to allow the Court to review 501(c)(3) statuses in order to make the subsidiary findings necessary to determine the applicability of the new antitrust exemption. Otherwise, all an antitrust defendant would need do is *allege* the exemption and thus deprive every district court in the country, save one, of antitrust jurisdiction. This clearly is not the law. Accordingly, this Court concludes that it is not divested of subject matter jurisdiction to determine whether the 501(c)(3) and 501(a) elements of Congress's new antitrust exemption are met. *See Stern & Co. v. State Loan & Fin. Corp.*, 205 F. Supp. 702 (D. Del. 1962); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

Although Defendants assert that *Youngblood v. FDIC*, 29 F.3d 225, 228-29 (5th Cir. 1994), requires federal courts to defer to I.R.S. determination letters, that case is distinguishable in several important aspects from the instant case. The issue in *Youngblood* was whether the Texas legislature contemplated that its own courts would independently determine whether a retirement plan is "qualified" under the Internal Revenue Code, especially when the I.R.S. had made a contrary determination. The Fifth Circuit reasoned that the state legislature likely did not intend for conflicts to develop between state courts and the I.R.S. in such a complex, specialized area of federal law, noting state court inexperience with federal tax matters. *Youngblood* involved a bankruptcy court's application of a state statute that referred to federal law, not the interpretation of federal law by an Article III court, and did not address I.R.S. determination letters with respect to 501(c)(3) status.

IV.

Defendant Lutheran Foundation of Texas's October 26, 1995 Motion to Reconsider the May 3, 1995 Order Granting Partial Summary Judgment, *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D.Tex. 1995), is **DENIED**. Soon after the Court's May 3, 1995 Order, the Texas Legislature, on May 23, 1995 and June 16, 1995,

"clarified" that the provisions in the Texas Insurance Code, Texas Deceptive Trade Practices Act, Texas Banking Code, and Texas Non-Profit Corporation Act that existed when this lawsuit was filed provided no basis for any of Plaintiff's Texas statutory claims. The Texas Legislature explicitly stated that it was not changing the laws undergirding the May 3, 1995 Order, but merely "clarifying" them. The Court considers the Texas Legislature's "clarifications" irrelevant.

Again, the Court is bound by what the Legislature said. As it stands, "clarifications" of pre-existing law (as the new state amendments refer to themselves) cannot serve as a basis for reconsideration of the Court's Order since they did not expressly state that they wanted to retroactively change pre-existing law. The Court presumes every word was used for a reason and that every word not chosen was excluded for a reason. Absent a clear and unambiguous expression that Texas statutes on which the Court's May 3, 1995 Order was based, are retroactively changed, these "clarifications" are meaningless.

Construction of prior law is the sole prerogative of the courts. *Central Bank of Denver v. First Interstate Bank of Denver,* 114 S. Ct. 1439, 1452 (1994); *Federal Crude Oil v. Yount-Lee Oil Co.*, 52 S.W. 2d 56, 63 (Tex. 1932); *Amplifone Corp. v. Cameron County,* 577 S.W. 2d 567, 570 (Tex. Civ. App. -- Corpus Christi 1979, no writ). The Court finds no cases which even remotely suggest that courts may or should abdicate their judicial responsibility to a lawmaking body. The Court also finds no cases which suggest that the judiciary is bound, when the Legislature declares that a prior law said "red," to give effect to a subsequent Legislature's "clarification" that the law should be construed to say "green," which is exactly the argument advanced by Defendants' Motion to Reconsider. Clearly, addition of such new specific exemptions from broad statutes does precisely that when they directly contradict the plain wording of the prior statutes, as they do in this instance. Insofar as it makes a contrary interpretation, the Court considers any persuasive or non-controlling state law authority on this

issue (of which the Court is only aware of two state trial court opinions) to be unpersuasive.

Accordingly, Defendant Lutheran Foundation of Texas's and Defendant Lutheran Church-Missouri Synod's October 26, 1995 Motion for Partial Summary Judgment seeking declarations contrary to the foregoing and Defendant American Council on Gift Annuities's and Defendant Lutheran Church-Missouri Synod's November 22, 1995 Motion for Partial Summary Judgment are **DENIED**.

* * *

For these reasons, Defendants' Motion to Dismiss and Renewed Motion for Relief are **GRANTED** as to Plaintiff's Investment Company Act of 1940 claim and as to Plaintiff's Texas Free Enterprise and Antitrust Act claim; are **DENIED** as to Plaintiff's Sherman Act claim; and are **DENIED** as to Plaintiff's state-law claims.

SO ORDERED this 30th day of September, 1996.

S/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

ORDER OF THE COURT OF APPEALS DENYING REHEARING AND REHEARING *EN BANC*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
No. 96-11332 FILED
No. 96-11439 SEP 15 1998
CHARLES R. FULBRUGE III
CLERK

DOROTHY L. OZEE,
Acting Individually as Attorney in Fact for Louise T. Peter, and as Next Friend for Louise T. Peter, on Behalf of Louise T. Peter Individually and All Others Similarly Situated, et al.,
Plaintiffs,

BOYD L. RICHIE,
as Guardian of the Estate of Louise T. Peter, on Behalf of Louise T. Peter Individually and on Behalf of All Others Similarly Situated,
Plaintiff-Appellee,

VERSUS

THE AMERICAN COUNCIL ON GIFT ANNUITIES, INC., Individually and as Successor to the COMMITTEE ON GIFT ANNUITIES, an Unincorporated Association, THE LUTHERAN CHURCH-MISSOURI SYNOD, THE LUTHERAN FOUNDATION OF TEXAS, BAPTIST FOUNDATION OF TEXAS, GRAY, PLANT, MOOTY, MOOTY & BENNETT, GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS d/b/a GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, ANDERSON UNIVERSITY, INC., d/b/a ANDERSON UNIVERSITY, MOUNT HOLYOKE COLLEGE, GOOD SHEPHERD HOME FOUNDATION, NORTHWESTERN UNIVERSITY, UNIVERSITY OF

COLORADO FOUNDATION, INC., THE SALVATION ARMY, A NEW YORK CORPORATION, THE SALVATION ARMY, A GEORGIA CORPORATION, THE SALVATION ARMY, A CALIFORNIA CORPORATION, THE SALVATION ARMY, AN ILLINOIS CORPORATION, UNITED CHURCH OF CHRIST, PLANNED GIVING SERVICES, INC., d/b/a PLANNED GIVING SERVICES, PLANNED GIVING RESOURCES, HAY/HUGGINS COMPANY, INC., PRERAU & TEITELL, VASSAR COLLEGE, AMERICAN BAPTIST FOREIGN MISSION SOCIETY, ST. OLAF COLLEGE, WITTENBERG UNIVERSITY, EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE MOODY BIBLE INSTITUTE OF CHICAGO, d/b/a MOODY BIBLE INSTITUTE, THE AMERICAN BIBLE SOCIETY, and AMERICAN LEPROSY MISSIONS, INC.,

Defendants-Appellants,

DAN MORALES,

Appellant,

* *

In re AMERICAN COUNCIL ON GIFT ANNUITIES, INC., et al.,

Petitioners

On Remand from the
Supreme Court of the United States

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/12/98, 5 Cir., 143 F.3d 937)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

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*Chief Judge Politz and Judges Higginbotham and Duhé are recused and did not participate in the consideration of the suggestion for rehearing en banc.

The petition for rehearing is DENIED. Judge Reavley would not have imposed sanctions but deferred to the judgment of the other judges, not only because he was outvoted, but also because he thought the original interlocutory appeal lacked arguable merit. Judge Emilio Garza dissents from denial of rehearing, *see American Bible Soc'y v. Richie*, 118 S. Ct. 597 (1997).

No member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (*see* FED. R. APP. P. 35, 5TH CIR. R. 35), the suggestion for rehearing en banc is DENIED.

JUDGMENT OF THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
No. 96-11332 FILED
JUN 12 1998
CHARLES R. FULBRUGE III
D.C. Docket No. 7:94-CV-128-X CLERK

DOROTHY L OZEE, Acting individually as attorney in fact for Louise T. Peter, and as next friend for Louise T Peter, on behalf of Louise T Peter individually and all others similarly situated, ET AL

Plaintiffs

BOYD L RICHIE, Guardian of the Estate of Louise T Peter

Plaintiff - Appellee

v.

THE AMERICAN COUNCIL OF GIFT ANNUITIES, INC, individually and on behalf of its members, sponsers and all others similarly situated to them, and as successor to The Committee on Gift Annuities, an unincorporated association; THE LUTHERAN CHURCH-MISSOURI SYNOD; LUTHERAN CHURCH MISSOURI SYNOD TEXAS DISTRICT; LUTHERAN FOUNDATION OF TEXAS; GRAY, PLANT, MOOTY, MOOTY AND BENNETT; SALVATION ARMY, A New York Corporation; SALVATION ARMY, An Illinois Corporation; SALVATION ARMY, A California Corporation; SALVATION ARMY, A Georgia Corporation; THE LUTHERAN CHURCH MISSOURI SYNOD FOUNDATION; BAPTIST FOUNDATION OF TEXAS, on behalf of themselves and all others similarly situated; SOUTHERN BAPTIST CONVENTION; GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, doing business as General Conference of Seventh-Day Adventists; ANDERSON UNIVERSITY, doing business as Anderson University; MOUNT HOLYOKE COLLEGE; GOOD SHEPHERD

HOME FOUNDATION; NORTHWESTERN UNIVERSITY; AMERICAN BAPTIST FOUNDATION; LOMA LINDA UNIVERSITY; SMITH COLLEGE; UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER; UNITED CHURCH OF CHRIST; PLANNED GIVING SERVICES, INC, doing business as Planned Giving Services, Inc; PLANNED GIVING RESOURCES; HAY-HUGGINS COMPANY, INC; PRERAU & TEITELL; VASSAR COLLEGE; AMERICAN BAPTIST FOREIGN MISSION SOCIETY; ST. OLAF COLLEGE; WITTENBERG UNIVERSITY; EVANGELICAL LUTHERAN CHURCH IN AMERICA; AMERICAN BIBLE SOCIETY; THE MOODY BIBLE INSTITUTE OF CHICAGO, d/b/a Moody Bible Institute; AMERICAN LEPROSY MISSIONS, INC

Defendants-Appellants

DAN MORALES

Appellant

Appeal from the United States District Court for the Northern District of Texas, Wichita Falls.

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JUDGMENT ON REMAND FROM THE UNITED STATES SUPREME COURT

This cause came on to be heard on remand from the Supreme Court of the United States and on further briefs of the parties.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ISSUED AS MANDATE: Sep 23 1998

EXCERPT OF REPLY BRIEF OF APPELLANTS THE MOODY BIBLE INSTITUTE OF CHICAGO d/b/a MOODY BIBLE INSTITUTE, THE AMERICAN BIBLE SOCIETY, AND AMERICAN LEPROSY MISSIONS, INC. (Filed Dec. 18, 1996)

* * *

ARGUMENT

Appellants The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, The American Bible Society, and American Leprosy Missions, Inc., (the "Moody Appellants") adopt the arguments set forth in the Reply Brief of Appellants and submit this separate reply brief to address Plaintiff's contention at pages 32-35 of his Brief that the District Court correctly concluded at page 8 of the September 30 Order that, "if the [American] Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception." For the reasons set forth below, that contention is wrong as a matter of law and the Moody Appellants are entitled to dismissal of Plaintiff's price-fixing claim pursuant to the Antitrust Relief Act, 15 U.S.C. § 37.

I. PLAINTIFF'S CONTENTION THAT EACH ISSUER'S IMMUNITY TURNS ON THE 501(c)(3) STATUS OF THE AMERICAN COUNCIL IGNORES THE LEGAL AND HISTORICAL BACKGROUND OF THE ANTITRUST RELIEF ACT.

As demonstrated in the Brief of Appellants, the District Court denied Defendants' Motion to Dismiss Plaintiff's price-fixing claim even though the District Court expressly acknowledged that Congress, in enacting the Antitrust Relief Act, sought as its overriding purpose to immunize from antitrust scrutiny the rate-setting scheme alleged in this action. Ironically, the District Court, in denying Defendants' motion, claimed to be adhering to the will of Congress rather than frustrating it. Thus, the District Court claimed to be following "the text's plain language" when it ruled that each Defendant's entitlement to the

immunity granted by the Antitrust Relief Act turns on a factual determination regarding the bona fides of the American Council's 501(c)(3) status:

> [I]f the Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception. *Hartford Fire Ins. Co. v. California*, 113 S.Ct. 2891, 2902-03 (1993). The new exemption in this case has both status-based ("persons described in section 501(c)(3) and exempt from taxation under section 501(a)") and conduct-based ("use or agreeing to use the same annuity rate" for purposes of issuing charitable gift annuities) elements similar to the Capper-Volstead exemption, 7 U.S.C. § 291. Even if the Rule of Forfeiture did not apply (which it does), the new exemption certainly does not exempt or otherwise authorize conspiracies with nonexempt entities.

Id. at 8. At pages 32-35 of his Brief, Plaintiff argues for affirmance of this conclusion.

In truth, "the text's plain language" requires no such result. Rather, when read in light of generally applicable principles of antitrust law and the specific antitrust allegations that motivated its enactment, the plain language of the Antitrust Relief Act clearly immunizes from antitrust scrutiny the purported rate-setting agreement challenged in this action, regardless of the 501(c)(3) status of the American Council or the 501(c)(3) status of any other entity that, like the American Council, is not alleged to have issued any charitable gift annuities.[1]

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[1]While the Moody Appellants agree that the best indication of congressional intent generally is the language Congress actually enacted into law, *see Hammers v. IRS*, 988 F.2d 32, 34 (5th Cir. 1993) (holding that "[t]he most certain expression of legislative intent in nearly every instance is the words of the subject statute"), they disagree with the District Court's conclusion that following the will of Congress as expressed in the plain language of the Antitrust Relief Act requires a

A. A Price-Fixing Conspiracy Requires the Participation of Horizontal Competitors.

To be unlawful under Section 1 of the Sherman Act, an alleged price-fixing agreement must be an agreement between or among competitors. "[A]n agreement not to compete between two parties who are not actual or potential competitors is not per se or otherwise illegal." *United States v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990), *cert. denied sub nom., Rutland v. United States*, 499 U.S. 936, 111 S. Ct. 1388 (1991); *see also Transource Int'l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 280 (5th Cir. 1984) (holding that agreement between a rail car manufacturer and a rail car marketer did not constitute a violation of Section 1 because the parties were neither actual nor potential competitors). An agreement between two entities that do not compete with

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result that is at odds with the conceded purpose of the statute: to immunize from antitrust scrutiny the alleged rate-setting agreement challenged by this lawsuit. Thus, the Moody Appellants believe that the District Court, while claiming to follow abundant precedent directing courts to eschew reliance on legislative history where the plain language of a statute is unambiguous, actually violated the first principle of statutory construction requiring courts to construe legislation in conformity with its purpose. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 113 S. Ct. 2173, 2182 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (citation omitted); *Negonsott v. Samuels*, 507 U.S. 99, 113 S. Ct. 1119, 1122 (1993) ("'Our task is to give effect to the will of Congress . . . .'") (citation omitted); *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001 (1990) (relying on statute's language, "the design of the statute as a whole," the statute's "object and policy," and its history to determine the meaning of a statute); *Hammers*, 988 F.2d at 34 ("The sole purpose of statutory construction . . . is to ascertain the intent of the legislative authority"). As a result, the District Court applied the Antitrust Relief Act in a manner that not only undermines what the District Court conceded was the specific intention of Congress in passing this legislation -- to immunize from antitrust scrutiny the rate-setting scheme underlying this action -- but also ignores both the principles of antitrust law that define an actionable price-fixing agreement and the nature of the alleged rate-setting conspiracy Congress sought to immunize by its enactment.

one another on the same level of distribution, even an agreement setting the prices at which each will sell its respective wares, is not actionable under the Sherman Act as a price-fixing agreement. *See Royal Drug Co., Inc. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436 (5th Cir. 1984) (holding that agreements between an insurance company and various retail pharmacies fell "outside those categories of activity classified as *per se* illegal price fixing . . . because the agreements [did] not run between competitors"), *cert. denied*, 469 U.S. 1160, 105 S. Ct. 912 (1985).

Although an actionable price-fixing conspiracy may include conspirators who do not compete with other members of the conspiracy, *see MMR Corp.*, 907 F.2d at 498 ("If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors"), an actionable price-fixing conspiracy must include at least two entities that compete horizontally on the same level of distribution, *see, e.g., United States v. All Star Indus.*, 962 F.2d 465, 469 (5th Cir.) ("'[A]greements among ***competitors*** to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.'") (emphasis added; citation omitted), *cert. denied sub nom., Midco Pipe & Tube, Inc. v. United States*, 506 U.S. 940, 113 S. Ct. 377 (1992); *Royal Drug Co.*, 737 F.2d at 1436. Thus, the defining quality -- the *sine qua non* -- of an unlawful price-fixing agreement is the participation of at least two entities that compete with one another in the same market. *See Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 470 (5th Cir. 1992); *All Star Indus.*, 962 F.2d at 469; *MMR Corp.*, 907 F.2d at 498; *Royal Drug Co.*, 737 F.2d at 1436; *Transource Int'l Inc.*, 725 F.2d at 280. Where such participation exists, liability attaches under Section 1; where such participation is absent, no unlawful price-fixing agreement exists. Although participation in such a conspiracy by persons who do not compete with other members of the conspiracy, whether such non-competitors participate as facilitators of the conspiracy or otherwise, does not negate the existence of an

actionable price-fixing agreement, such participation is neither a necessary nor a sufficient condition to antitrust liability. For purposes of antitrust analysis, the participation of such non-competitors is irrelevant.

B. The Structure of the Antitrust Relief Act Reflects the Requirement of Horizontal Competition.

From the foregoing discussion of price-fixing agreements, it is easy to see how Congress could draft an antitrust exemption that would exempt the widget market from price competition and immunize all widget sellers from liability for price fixing. Because an agreement setting prices for widgets is actionable only if two or more widget sellers are parties to the agreement, Congress could grant an immunity for widget sellers by enacting legislation structured very similarly to the Antitrust Relief Act and providing: "It shall not be unlawful under the federal antitrust laws for 2 or more widget sellers to use, or to agree to use, the same price for the purpose of selling 1 or more widgets." Such legislation would exempt a wide range of otherwise actionable combinations, including: an agreement between any two widget sellers; an agreement among any two widget sellers and an advertising firm; an agreement among any four hundred widget sellers, a trade association of widget sellers, and an advertising firm; and any other combination alleged to be unlawful on the ground that it involved a horizontal agreement to fix the price of widgets. It would exempt all such combinations, because each would be unlawful in the absence of the statutory immunity only insofar as it involved an agreement between or among two or more widget sellers competing horizontally for sales of widgets. By exempting from antitrust scrutiny the common feature that made each such combination unlawful in the absence of the statutory immunity -- an agreement between or among two or more competitors for widget sales -- Congress would have immunized all such combinations alleged to be unlawful on the ground that they involved horizontal agreements to fix the price of widgets.

Similarly, if the issuance of charitable gift annuities were misconstrued to be trade or commerce within the meaning of the Sherman Act, as it was by the District Court's Order dated March 14, 1995,[2] and Congress wished to exempt the issuance of charitable gift annuities from price competition and to immunize all issuers of charitable gift annuities from antitrust scrutiny for alleged price fixing, Congress could do so by enacting a similarly structured statute providing: "It shall not be unlawful under the federal antitrust laws for 2 or more issuers of charitable gift annuities to use, or to agree to use, the same annuity rate for the purpose of issuing one or more charitable gift annuities." Such a statutory exemption would immunize from antitrust scrutiny: an agreement between any two issuers of charitable gift annuities; an agreement among any two issuers of charitable gift annuities and an actuarial firm; an agreement among any four hundred issuers of charitable gift annuities, an association of such issuers, and an actuarial firm; and any other combination alleged to be unlawful on the ground that it involved a horizontal agreement to fix the rates of return for charitable gift annuities. It would immunize all such combinations, because each would be unlawful in the absence of the statutory immunity only insofar as it involved an agreement between or among two or more issuers of charitable gift annuities competing horizontally to issue one or more charitable gift annuities.

C. The Text of the Antitrust Relief Act Reflects Plaintiff's Allegations in this Action.

If, as Plaintiff suggests at pages 33-34 & n.10 of his Brief, Congress were unwilling to confer antitrust immunity

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[2]As demonstrated in the Brief of Appellants at 31-33, the issuance of charitable gift annuities does not constitute trade or commerce subject to antitrust scrutiny. *See D.E.L.T.A. v. Humane Soc'y of the United States, Inc.*, 50 F.3d 710, 712-14 (9th Cir. 1995). For the purpose of the arguments made in this Reply Brief only, however, the Moody Appellants assume *arguendo* that the issuance of charitable gift annuities constitutes trade or commerce subject to the Sherman Act.

on ***all*** potential issuers of charitable gift annuities but, instead, wished to immunize only the issuers whose alleged anticompetitive behavior was being subjected to scrutiny in this lawsuit, then a statute providing that "[i]t shall not be unlawful under the federal antitrust laws for 2 or more issuers of charitable gift annuities to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities" would be too broad to achieve Congress' specific intent. Importantly, however, the overbreadth of such a statute would not lie in its immunization of rate-setting agreements involving entities such as the American Council that do not issue charitable gift annuities. As noted *supra* at 3-4, the participation of such non-issuers is irrelevant to the underlying antitrust analysis, because those non-issuers, by definition, do not compete with issuers. Moreover, the legislative history of the Antitrust Relief Act demonstrates that Congress was not concerned with the participation of the American Council or any other non-issuing entities, such as attorneys, accountants, actuaries, or consultants. *See* H.R. Rep. 104-336, 104th Cong. 1st Sess. (1995) (stating that the Antitrust Relief Act was intended "to extend to attorneys, accountants, actuaries, consultants, and others . . . when assisting [501(c)(3) organizations] in the issuance of a charitable gift annuity or the setting of charitable annuity rates").[3] Rather, as Plaintiff acknowledges at pages 33-34 & n.10 of his Brief, the hypothetical statute discussed above would be too broad because it would immunize an agreement between ***any*** two issuers of charitable gift annuities, even if the conduct of neither were a subject of this action. Thus, for example, such a statute would immunize an agreement between two entities described in

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[3]In fact, the House Report states plainly that Congress intended the exemption "to include the act of publishing suggested annuity rates. Thus, a non-profit organization such as the American Council on Gift Annuities could not be in violation of the antitrust laws due to its publication of actuarial tables or annuity rates for use in issuing gift annuities." H.R. Rep. 104-336, 104th Cong. 1st Sess. (1995).

26 U.S.C. §§ 170(c)(3) and 501(c)(20), such as the VFW and the American Legion, neither of whom is alleged to be a party to the conspiracy challenged in this action. To achieve its specific purpose to immunize the rate-setting scheme alleged in this case, therefore, Congress had to include in the statute verbiage specifying the particular subset of issuers that it intended to immunize from antitrust scrutiny.

Coming up with a description of the specific issuers Congress intended to protect was not difficult, for, as Congress was aware from its review of this case, each of the "competitors" for "sales" of charitable gift annuities alleged to be a conspirator in this action is (or at the very least claims to be) an organization described in 26 U.S.C. § 501(c)(3) that is exempt from taxation under 26 U.S.C. § 501(a). Armed with this common attribute of the subset of issuers it sought to immunize, Congress crafted a statute structured to reflect the generally applicable principles of price-fixing law discussed above and worded to specify the subset of issuers Congress sought to immunize from this unprecedented lawsuit and any other suits of its ilk. The result is a purposefully tailored statute providing that "it shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code . . . that are exempt from taxation under section 501(a) of such Code to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities." 15 U.S.C.S. § 37 (Lawyers Coop. 1996 Supp.).

D. The Structure and Text of the Antitrust Relief Act Support Defendants.

From the foregoing discussion, it is apparent that the structure and text of the Antitrust Relief Act are carefully crafted to immunize from antitrust scrutiny ***any*** combination alleged to be unlawful on the ground that it constitutes an agreement between or among 501(c)(3) issuers of charitable gift annuities to fix the annuity rate for charitable gift annuities issued by any parties to such agreement that are 501(c)(3) organizations competing to issue charitable gift annuities. Contrary to Plaintiff's

assertions, the structure and language of the Antitrust Relief Act -- when considered in their legal and historical context -- plainly immunize from antitrust scrutiny: an agreement between any two or more 501(c)(3) organizations fixing the annuity rate on charitable gift annuities issued by some or all of them; an agreement among any two or more 501(c)(3) organizations and any one or more non-issuer(s) of charitable gift annuities -- regardless of the tax-exempt status(es) of such non-issuer(s) -- fixing the annuity rate on charitable gift annuities issued by some or all of the 501(c)(3) organizations; and any other combination alleged to be an unlawful agreement to fix the annuity rate for charitable gift annuities issued by any one or more 501(c)(3) organization(s). The Antitrust Relief Act immunizes all such combinations, because, as noted above, each would subject its members to liability in this lawsuit in the absence of the statutory immunity only insofar as it involved an agreement between or among two or more of the entities alleged in this action to be competitors for the issuance of charitable gift annuities -- that is, "two or more persons described in section 501(c)(3) of the Internal Revenue Code . . . that are exempt from taxation under section 501(a) of such Code . . . ."

As noted above, the participation of persons not alleged to be competitors in the issuance of charitable gift annuities simply has no antitrust significance; such participation is neither a necessary nor a sufficient condition to liability for price fixing. Thus, when viewed from an antitrust perspective, the 501(c)(3) status of non-issuers such as the American Council is irrelevant to the purpose Congress intended to achieve through enactment of the Antitrust Relief Act. Even if the Court were to assume, as Plaintiff asserts, that the American Council is not a bona fide 501(c)(3) organization, therefore, the District Court's conclusion that the Moody Appellants' immunity under the Antitrust Relief Act turns on the 501(c)(3) status of a non-issuer such as the American Council is not only contrary to the will of Congress as expressed in the legislative history of

the Antitrust Relief Act but also contrary to the plain language Congress enacted into law.

II. APPELLEE'S CONTENTION THAT EACH ISSUER'S IMMUNITY TURNS ON THE ACCURACY OF EACH AND EVERY OTHER ISSUER'S APPLICATION FOR TAX-EXEMPT STATUS IGNORES COMMON SENSE AND THE MANIFEST PURPOSE OF THE ANTITRUST RELIEF ACT.

Plaintiff also has attempted to avoid dismissal pursuant to the Antitrust Relief Act by recklessly alleging that two of the issuer Defendants (i.e., the Baptist Foundation of Texas and the Lutheran Foundation of Texas) also are not "bona fide 501(c)(3) entities." *See* Fourth Amended Class Action Complaint ¶ 73; *see also* Brief of Appellee at 31 (asserting that Plaintiff has alleged "agreements with certain entities holding 501(c)(3) letters but actual [sic] formed and operated for the substantial purpose of managing private investments"). According to Plaintiff, his allegation that certain issuers who agreed to use Council rates for issuing charitable gift annuities are not bona fide 501(c)(3) organizations that are exempt from taxation under section 501(a) of the Code bars dismissal of his claims against the Moody Appellants, notwithstanding Plaintiff's failure to allege any basis for concluding (a) that any of the Moody Appellants is not a bona fide 501(c)(3) organization that is exempt from taxation under section 501(a) of the Code or (b) that any of the Moody Appellants knew or should have known of any other issuer's alleged lack of such bona fide status. *See* Fourth Amended Class Action Complaint.[4]

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[4]Where, as here, a plaintiff seeks to establish a Sherman Act violation by members of a group of persons to whom Congress has granted an express statutory exemption from the antitrust laws, the plaintiff must plead and prove specific facts that would place the defendants' conduct outside the scope of the exemption granted by Congress. *See USS-POSCO Indus. v. Contra Costa County Bldg. and Constr. Trades Council*, AFL-CIO 31 F.3d 800, 805 n.2 (9th Cir. 1994) (holding that plaintiff seeking to hold labor union liable under the

Plaintiff's argument should be rejected for at least two reasons. First, its application would lead to bizarre results that Congress clearly could not have intended. Second, its adoption would unfairly deny Defendants the very same right that Plaintiff claims for himself and the putative plaintiff class to rely on IRS determination letters issued to issuers of charitable gift annuities.

A. Plaintiff's Interpretation of the Act Would Produce Bizarre Results.

The bizarre consequences that would attend acceptance of Plaintiff's argument are well illustrated by the hypothetical example of a rate-setting agreement formed in 1996 between two issuers of charitable gift annuities: one proven in court in 1999 to be an organization described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26

Sherman Act had the burden of pleading and proving that union's purported anticompetitive conduct fell outside the statutory labor exemption found in 15 U.S.C. § 17); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 886 (7th Cir.) (affirming dismissal of antitrust claims against union, because plaintiff failed to allege that union had conspired with a non-labor entity and thus engaged in the conduct beyond the scope of the statutory labor exemption), *cert. denied*, 459 U.S. 860 (1982); *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, 511 F. Supp. 711, 715 (N.D. Cal. 1981) (granting judgment on the pleadings to defendants on claim under Section 2 of Sherman Act, because plaintiff had failed to allege "predatory behavior by defendant[]" agricultural products cooperative that would place conduct of such cooperative beyond scope of antitrust exemption granted by Capper-Volstead Act, 7 U.S.C. §§ 291, 292); *see also id.* at 716 ("plaintiffs charging an agricultural cooperative with monopolization must establish specific acts, predatory in nature, which fall outside the purview of legitimate Capper-Volstead purposes"); *Frankford Hosp. v. Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104, 1112 (E.D. Pa. 1976) (observing that "the Sherman Act is irrelevant [to defendant insurer's liability] until plaintiff can carry its burden of showing that the McCarran-Ferguson Act does not apply"), *aff'd*, 554 F.2d 1253 (3d Cir. 1977). Thus, contrary to Plaintiff's unsupported assertion at page 20 n.4 of his Brief that Defendants have the burden of showing that they qualify for the immunity granted by the Antitrust Relief Act, Plaintiff bears the burden of pleading and proving that the Moody Appellants' conduct falls outside the scope of the antitrust immunity granted by Congress.

U.S.C. § 501(a) and another proven in court in 1999 to fail the criteria set forth in Section 501(c)(3) and to have fraudulently obtained its IRS determination letter in 1990. Under Plaintiff's logic, the issuer proven in court to be a 501(c)(3) entity could be held liable for treble damages, plus costs and attorneys' fees, regarding charitable gift annuities issued pursuant to the agreement by either issuer in 1996, 1997, 1998, and 1999, even if it had conscientiously examined the other issuer's IRS determination letter and Publication 78's listing of tax-exempt entities before entering in 1996 what it justifiably believed to be a lawful rate-setting agreement. Indeed, because there is no right of contribution in antitrust cases, *see Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-46 (1981), the issuer proven in court to be a 501(c)(3) entity could be forced to pay the entire judgment, while the issuer who obtained its determination letter fraudulently could avoid paying a dime. Although Plaintiff is correct in asserting that the legislative history of the Antitrust Relief Act suggests that Congress did not intend to afford immunity to issuers guilty of defrauding the IRS, *see* Brief of Appellee at 25 & n.5, nothing in the legislative history or in the text of the Antitrust Relief Act suggests that Congress intended to expose honest 501(c)(3) organizations to antitrust scrutiny where, through no fault of their own, one of the entities with whom they acted in concert to establish rates of return for charitable gift annuities was later revealed to have obtained its 501(c)(3) determination letter by fraud or mistake. Because it would produce such "bizarre" results, Plaintiff's interpretation of the Antitrust Relief Act clearly should be rejected. *See Demarest v. Manspeaker*, 498 U.S. 184, 190-91, 111 S. Ct. 599, 604 (1992) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 575, 102 S. Ct. 3245, 3250, 3252 (1982), for the proposition that an interpretation of an apparently unambiguous statute is sufficiently "'at odds with the intentions of its drafters'" to be rejected where it would cause a result "so bizarre that Congress 'could not have intended' it").

B. Plaintiff's Interpretation of the Act Would Unfairly Deny Defendants a Right Plaintiff Claims for Himself.

Adopting Plaintiff's logic also would unfairly deny to honest issuers of charitable gift annuities the very same right that Plaintiff claims for himself and the putative Plaintiff class to rely on IRS determination letters.

At pages 16-17 of his Brief, Plaintiff argues that he is not estopped by Ms. Peter's tax deductions from challenging the 501(c)(3) status of charities who allegedly conspired to set the rates of return on the charitable gift annuities issued to Ms. Peter. In essence, Plaintiff asserts that he is free to challenge the tax-exempt status of the Defendants without endangering his ward's tax deductions because the tax deductions are available to donors regardless of the recipient's actual tax status. *See* Brief of Appellee at 19. At the same time, however, he argues that the Moody Appellants are not entitled to rely on IRS determination letters. *Id.* at 16-23.

Plaintiff's argument makes no sense. In truth, the Moody Appellants are far more entitled to rely on other issuers' IRS determination letters than is the Plaintiff.

The regulation on which Plaintiff relies applies when, through no action by the taxpayer, the IRS withdraws its prior determination that an entity to whom the taxpayer made donations in good faith is exempt from taxation under section 501(a). *See* Brief of Appellee at 19-20. In such a circumstance, allowing the taxpayer a right to such reliance makes sense, because the taxpayer has done nothing inconsistent with the existence of the organization's 501(c)(3) status, and the loss of such status is attributable solely to the actions of a third party (the IRS) over whom the taxpayer has no control.

Here, Plaintiff's claim that he is entitled to rely on the IRS' prior determination of the Defendants' respective tax-exempt statuses (and that he need not amend Ms. Peter's tax returns to delete her deductions concerning her charitable gift annuities in order to have standing to challenge such statuses in this case) stands on much weaker

footing than that usually supporting a taxpayer claiming a right to such reliance. In this case, it is the Plaintiff himself -- not a third-party over whom the Plaintiff has no control -- who has challenged the tax-exempt statuses underlying Ms. Peter's prior tax deduction. In other words, it is the Plaintiff and his ward -- not the IRS -- who have taken inconsistent positions concerning the nature of Ms. Peter's annuities as charitable giving. Only Plaintiff -- not the IRS -- has come into court and alleged that what Ms. Peter deducted as a charitable gift to a tax-exempt entity was in fact a purchase of a commercial investment product from an entity that has conspired with others in violation of the federal antitrust laws. Unlike an innocent donor who happens to have given to an entity whose tax-exempt status was later challenged by the IRS, Plaintiff is the sole architect of the judicial determinations he now seeks concerning the Defendants' respective 501(c)(3) statuses. Having accepted a tax benefit available only because of the tax-exempt status of the issuer of Ms. Peter's annuities, it ill behooves Plaintiff to challenge the foundation of that deduction in this action.[5]

In contrast, none of the Moody Appellants has done anything -- certainly, none of the Moody Appellants has been accused in this lawsuit of doing anything -- that is inconsistent with the 501(c)(3) status of the American Council or that of any of the Defendant issuers of charitable gift annuities. Rather, the Moody Appellants have acted consistently with such status in a manner that Congress has ***unanimously*** approved via the Antitrust Relief Act. Thus, the Moody Appellants are far more entitled than the Plaintiff to rely in their dealings with the other Defendants on the IRS' prior determination of the 501(c)(3) status of each of those Defendants. Accordingly, equity bars Plaintiff from recovering from any of the Moody Appellants in this

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[5]Thus, as explained in the Brief of Appellants at 22-23, Plaintiff is estopped from challenging the tax-exempt status of the American Council, the Baptist Foundation of Texas, or the Lutheran Foundation of Texas.

case as a result of an allegation -- or even as a result of proof -- that one or more of the issuer Defendants is not described in section 501(c)(3) and exempt from taxation under section 501(a).[6]

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[6]Importantly, there is no reason to conclude, as Plaintiff assumes, that Congress has made Plaintiff the watch dog of charities' compliance with the Internal Revenue Code. As noted in the Brief of Appellants at 23-30, the Antitrust Relief Act codifies Congress' policy decision that, in order to achieve philanthropic goals that Congress deems more important, the "market" for charitable gift annuities will not be price competitive. Indeed, this is the only logical interpretation of Congress' purpose in expressly permitting all issuers of charitable gift annuities collectively to establish a uniform set of rates at which all such issuers may issue charitable gift annuities. Plaintiff's silent assumption that Congress' use of the phrase "persons described in section 501(c)(3) of the Internal Revenue Code . . . that are exempt from taxation under section 501(a) of such Code" to describe the specific issuers entitled to the antitrust exemption was intended to deputize Plaintiff as the IRS' police force finds support neither in the Antitrust Relief Act nor in logic.

Given Congress' acceptance of a "market" for charitable gift annuities that is devoid of price competition, Plaintiff's suggestion that Ms. Peter was harmed by an agreement among issuers of charitable gift annuities, because a few issuers might have obtained their IRS determination letters improperly, is nonsense. It is not surprising, therefore, that neither the Plaintiff nor the District Court has explained *how* the participation of non-501(c)(3) organizations in an otherwise admittedly legal agreement injured Ms. Peter or reduced price competition in the "market" for charitable gift annuities, which Congress has unanimously and unequivocally stated is one in which no price competition is required. Neither the Plaintiff nor the District Court has offered any reason to read the "plain language" of the Antitrust Relief Act to differentiate between rate-setting agreements in which entities erroneously believed to be bona fide 501(c)(3) organizations have participated and rate setting agreements in which they have not. Further, the legislative history demonstrates beyond question that Congress consciously intended the protections of the Antitrust Relief Act to extend to those acting in concert with 501(c)(3) charities to promulgate and publish uniform rates for charitable gift annuities. As noted above, the House Report states that the Antitrust Relief Act was intended "to extend to attorneys, accountants, actuaries, consultants, and others . . . when assisting [501(c)(3) entities] in the issuance of a charitable gift annuity or the setting of charitable annuity rates." H.R. Rep. 104-336, 104th Cong. 1st Sess. (1995). The House Report also states

III. PLAINTIFF'S RELIANCE ON CAPPER-VOLSTEAD IS MISPLACED.

Plaintiff's effort to avoid dismissal by relying on Capper-Volstead cases also should be rejected. Contrary to Plaintiff's assertion at pages 32-33 of his Brief, there is no generally applicable "rule of forfeiture" providing that an "exempt entity" that conspires with a "non-exempt entity" loses its antitrust immunity. *See Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 2902-03 (1993) (the Capper-Volstead Act's "rule about acting in concert with non-exempt parties" is "inapplicable" outside the Capper-Volstead context). Rather, each exemption from the antitrust laws must be examined according to its terms and consistently with antitrust principles. *See Hartford*, 113 S. Ct. at 2901-03 (reasoning that antitrust exemption is not necessarily lost where parties who were entitled to such exemption engaged in concerted conduct with persons to whom exemption arguably did not apply; holding that "it was error for the [Ninth Circuit] to hold the domestic insurers bereft of their McCarran-Ferguson Act exemption simply because they agreed or acted with foreign reinsurers that, we assume for the sake of argument," did not satisfy one element of the McCarran-Ferguson exemption).[7]

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that Congress intended the exemption "to include the act of publishing suggested annuity rates. Thus, a non-profit organization such as the American Council on Gift Annuities could not be in violation of the antitrust laws due to its publication of actuarial tables or annuity rates for use in issuing gift annuities." *Id.* There is no logical reason to depart from Congress' clearly expressed, unambiguous intention. Plaintiff's apparent belief that doing so would somehow aid enforcement of the Internal Revenue Code, which otherwise provides no private right of action, certainly is no such reason.

[7]The District Court's citation of the *Hartford* case as support for the proposition that, "if the Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception" is puzzling. In *Hartford*, the Supreme Court unequivocally and unanimously reversed the Ninth Circuit's ruling that "[m]embership of an exempt entity in a conspiracy

As demonstrated above, the Moody Appellants are entitled to the immunity granted by the Antitrust Relief Act, because none of the non-501(c)(3) entities with whom they have been accused of conspiring is a competitor for the issuance of charitable gift annuities.[8] In contrast, in each of

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with nonexempt entities makes the exempt entity liable." *See Hartford*, 113 S. Ct. 2891, 2900-03 (reversing in relevant part *sub nom. In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991)). The *Hartford* Court ruled that the Ninth Circuit erred by relying on inapposite dictum from the *Royal Drug* case, which dictum the Supreme Court held to be inapplicable outside of the context of the Capper-Volstead exemption. *See Hartford*, 113 S. Ct. at 2902-03 (holding that "the rule about acting in concert with nonexempt parties," was "derived from a statute [Capper-Volstead] inapplicable" on the facts of the *Hartford* case). Thus, the holding of the *Hartford* case provides no support for the District Court's conclusion that, "if the [American] Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception."

[8]Recognizing that none of the non-501(c)(3) entities with whom the Moody Appellants have been accused of conspiring is a competitor of any of the Moody Appellants for the issuance of charitable gift annuities, Plaintiff has attempted to evade Congress' prescription for the dismissal of this case in three ways. First, Plaintiff has alleged that the American Council is not "really" a 501(c)(3) entity. Second, Plaintiff has alleged that at least two issuers of charitable gift annuities that allegedly agreed to use Council rates, the Baptist Foundation of Texas and the Lutheran Foundation of Texas, are not "really" 501(c)(3) entities. Third, Plaintiff has argued that charitable gift annuities compete in the same market with commercial investment products and that various commercial entities that issue commercial annuities and other commercial investment products are parties to the alleged agreement setting rates for charitable gift annuities.

Contrary to the District Court's conclusions, Plaintiff's efforts to stave off dismissal fail as a matter of law. As demonstrated *supra* at 2-8, Plaintiff's first argument fails as a matter of law, because the American Council is not an issuer of charitable gift annuities. As demonstrated *supra* at 8-12, Plaintiff's second argument fails as a matter of law, because the Moody Appellants are entitled to rely on the 501(c)(3) determination letters received by other issuers. Plaintiff's third argument fails as a matter of law, because Plaintiff has no standing to

Plaintiff's Capper-Volstead cases, the entity whose participation was held to destroy the Capper-Volstead exemption was either an actual or a potential competitor of the participating farmers, planters, ranchers, dairymen, or nut or fruit growers who were otherwise entitled to Capper-Volstead protection. *See, e.g., National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827-29, 98 S. Ct. 2122 (1978) (holding that Congress did not intend to exempt membership in cooperatives of non-farmers who perform different "economic roles" than farmers); *United States v. Borden Co.*, 308 U.S. 188, 205, 60 S. Ct. 182 (1939) (finding the Capper-Volstead exemption did not protect milk producers who participated in combined attempts of "producers, distributors and their allies" to control the production, distribution, and retail milk markets); *see also Alexander v. National Farmers Org.*, 687 F.2d 1173, 1186 (8th Cir. 1982), *cert. denied*, 461 U.S. 937, 938, 939, 103 S. Ct. 2108, 2110 (1983) (noting (1) that *National Broiler* and similar cases address the effect of non-farmer "middlemen's" membership in otherwise exempt cooperatives, and (2) that the Court's conclusion in *National Broiler* that "not even one" non-farmer may belong to a cooperative "cannot be divorced from that Court's emphasis on the economic role of such middlemen and on the intent of Congress not to permit such middlemen to participate in price-fixing"). Accordingly, Plaintiff's Capper-Volstead cases are inapposite.

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complain of a conspiracy involving commercial investment products. Plaintiff has alleged neither that his ward suffered injury by purchasing commercial investment products at rates that were lower than they would have been in the absence of the alleged participation of such commercial entities in the alleged conspiracy among issuers of charitable gift annuities nor that the participation of such alleged commercial conspirators, who, by statute, cannot issue charitable gift annuities, was a but-for or proximate cause of Ms. Peter receiving a less-than-competitive rate of return on her charitable gift annuities. Thus, Plaintiff has alleged no antitrust injury as a result of the conduct he has pleaded in an effort to circumvent the Antitrust Relief Act.

CONCLUSION

For the reasons stated above, neither the alleged participation of any non-issuer, regardless of its tax-exempt status, nor the alleged participation of any issuer previously determined by the IRS to be an organization described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a) can deprive the Moody Defendants of the immunity from suit granted to the Moody Appellants by the Antitrust Relief Act. Accordingly, the Moody Appellants, whose respective statuses as organizations described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a) has not been challenged in this action, are entitled to judgment as a matter of law dismissing Plaintiff's price-fixing claim with prejudice. Therefore, the portion of the District Court's September 30 Order denying Defendants' Motion to Dismiss as to the Moody Appellants, the portion of the District Court's September 30 Order granting Plaintiff leave to file his Fourth Amended Complaint as to the Moody Appellants, and the portion of the District Court's Order Dismissing Certain Individual Claims and Dismissing Class Claims Against Concordia Lutheran College dated September 30, 1996, granting Plaintiff leave to file a Fifth Amended Complaint as to the Moody Appellants should be reversed.

December 17, 1996

Respectfully submitted,
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EXCERPT OF AMENDED BRIEF OF *AMICI CURIAE*, UNITED STATES REPRESENTATIVE HENRY J. HYDE AND OTHER MEMBERS OF THE 104TH CONGRESS OF THE UNITED STATES OF AMERICA
(Filed Dec. 2, 1996)

* * *

INTEREST OF *AMICI*

Amici are members of the United States House of Representatives in the 104th Congress. Several *amici* are members of the House Judiciary Committee, and are original sponsors of the Charitable Gift Annuity Antitrust Relief Act, H.R. 2525 (Pub. L. No. 104-63, 109 Stat. 687, *codified at* 15 U.S.C. § 37 (Supp. 1996)), the legislation which is at issue in this proceeding. H. R. Rep. No. 336, 104th Cong., 1st Sess. 4 (1995).

United States Representative Henry J. Hyde, from Illinois, is Chairman of the Committee on the Judiciary of the United States House of Representatives and was both the principal original sponsor and manager of the bill during its consideration on the floor of the House of Representatives. Representative Sonny Bono is from California. Representatives John Bryant and Lamar Smith are from Texas. Representatives Bill McCollum and Charles Canady are from Florida. Representative Jim Ramstad is from Minnesota. Representative Steve Schiff is from New Mexico. Representative F. James Sensenbrenner is from Wisconsin. Senator Thomas A. Daschle is from South Dakota. Senator Christopher J. Dodd, from Connecticut, is an original sponsor of the Senate counterpart to H.R. 2525.

H.R. 2525 was passed without a single dissenting vote in either the House or the Senate. 141 CONG. REC. H 13680 (daily ed., November 28, 1995), S 17828 (daily ed., November 29, 1995). Congress is rarely unanimous in legislating. Thus, *amici*, as legislators directly involved in and responsible for the passage of the legislation, believe they can speak with unusual authority in informing the Court of Congress's intent to immunize these charities from this litigation and other actions like it.

ARGUMENT

On November 28 and 29, 1995, the United States House of Representatives and the United States Senate, respectively, passed unanimously the Charitable Gift Annuity Antitrust Relief Act, H.R. 2525 (Pub. L. No. 104-63, 109 Stat. 687, *codified at* 15 U.S.C. § 37 (Supp. 1996)); 141 CONG. REC. H 13680 (daily ed., November 28, 1995), S 17828 (daily ed., November 29, 1995).

Congress was aware of the claims being brought in this case and this legislation was intended to "provide a complete defense to the antitrust portions of *Richie*." *See, e.g.*, H. R. Rep. No. 336, 104th Cong., 1st Sess. 4 (1995). Without waiting for a conclusion in the court below, Congress acted "in a very zealous fashion to make sure that no outcome that would cast a doubt over many of the activities of nonprofits could ever occur." 141 CONG. REC. H 13678 (daily ed., November 28, 1995) (remarks of House Committee on the Judiciary ranking member Conyers).

Congress acted so swiftly because the "loss to society [from the effect on charities and charitable giving] far outweighs any possible benefit from the application of the antitrust laws to the setting and use of charitable annuity rates." *Id.*, (remarks from Chairman Hyde); *see also*, H. R. Rep. No. 336, 104th Cong., 1st Sess. 3 (1995) ("Allowing litigants to use the antitrust laws as an impediment to these beneficial activities should not be countenanced where, as here, there is no detriment associated with the conduct.").

Congress found no public purpose in applying the antitrust laws in this case: "In this limited instance, however, it would serve **no public policy purpose** to subject the calculation of charitable gifts to antitrust scrutiny." *Id.* at 4 (emphasis added). Thus, this legislation clearly provides that the antitrust laws do not apply to any "use" by charities of the American Council on Gift Annuities' suggested rates.

The lower court acknowledged both the intent of the legislation to end this suit, slip op. at 5, and the negative effect Congress intended to avoid. Slip op. at 5-6, n. 9 ("the Court has no doubt as to what Congress wanted to

accomplish"). Yet the lower court denied the defendant charities' motion for dismissal and has indicated an intent to examine the charities' pre-existing tax exemptions in this litigation. *Amici* respectfully suggest that the district court has acted contrary to the letter, spirit and intent of the Charitable Gift Annuity Antitrust Relief Act in allowing the plaintiff to continue a statutory cause of action despite Congress's having acted explicitly, clearly, and quickly to prevent the application of the antitrust laws.

The lower court's actions in ignoring the language and purpose of the new statute have frustrated Congress's intent in enacting this legislation and injured the public policies Congress considered important. *Amici* appreciate the Court's having expedited this appeal. Time is of the essence in relieving the public policy damage done by the lower court's actions. The holiday season is the peak period for charitable giving, which encouraged us to act swiftly last year. *See, e.g.*, 141 CONG. REC. S 17828 (daily ed., November 29, 1995) (remarks of Senator Pressler).

CONCLUSION

Amici respectfully urge the Court to reverse the lower court refusal to dismiss this case, and to enforce the public policy balance Congress struck in 1995.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR *AMICI CURIAE*

LETTER FROM THE HONORABLE JOE KENDALL TO THE HONORABLE W. EUGENE DAVIS, THE HONORABLE JACQUES L. WEINER, JR., AND THE HONORABLE FORTUNATO P. BENAVIDES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS, TEXAS 75242

CHAMBERS OF
JUDGE JOE KENDALL (214) 767-8343

December 13, 1996

Judge W. Eugene Davis
Judge Jacques L. Weiner, Jr.
Judge Fortunato P. Benavides
U.S. Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: *Richie v. The American Council on Gift Annuities, et al,* Appeal No. 96-11332

I started not to respond to the petition for writ of mandamus, but feel I should on the off chance this Court might be misled as to what is really going on in this case. If histrionics and hyperbole were an art form, what the petitioners have filed would be a Rembrandt. So in the spirit of Paul Harvey, I write with the rest of the story.

On October 15, 1996, the defendants filed an interlocutory appeal which I suggest has patent jurisdictional defects. No mandamus was filed at that time. On November 8, 1996, Judge Benavides set the interlocutory appeal for oral argument. Still no mandamus. On November 12, 1996, I understand that your staff attorneys

requested briefing on the jurisdictional issues, recognizing, I presume, the obvious lack of appellate jurisdiction. By now the handwriting was on the wall. Five weeks after the appeal was filed, on November 22, 1996 the mandamus, clearly within this Court's jurisdiction, was finally filed "in the alternative" to the interlocutory appeal. When you cut through all the rhetoric, this mandamus is nothing more than the same interlocutory appeal of the non-final, non-collateral order denying a 12(b)(6) motion that raised the red flag of lack of jurisdiction with the staff attorneys upon initial review. Exaggeration and embellishment were added and the appeal was recast as a mandamus.

Mandamus is an extraordinary remedy. By definition, it should be rarely granted and then only when a legal duty to take some action is apparent and free of doubt. In other words, mandamus should only be granted when reasonable minds could not differ and when failure to take the action sought is a clear abuse of discretion. Simply being wrong is insufficient -- that circumstance is addressed by an old-fashioned appeal after final judgment.

To really make a case for mandamus, it helps to characterize the district judge as some kind of off-the-wall nut who is either too stupid to understand or too lacking in integrity to follow what the law "clearly" is. Such is the case here. As a former advocate I don't take such arguments personally -- I understand everyone is simply doing what they are being paid to do. An examination of facts that were either obfuscated or conveniently ignored by the petitioners will demonstrate, I believe, that this panel is not dealing with some loose cannon that needs bolting down.

To begin with, keep in mind that the order under attack in this mandamus petition is the district court's failure to dismiss this case under Rule 12(b)(6); an action this Court discourages a district court from taking absent exceptional circumstances. The order of September 30, 1996 denying the defendants' 12(b)(6) motion has been mischaracterized and selectively quoted. In the Charitable Gift Annuity Antitrust Relief Act of 1995 [hereinafter "the Relief Act"], Congress changed the law and exempted certain entities,

specifically those which are commonly called "charities," from the Sherman Act. Congress lifted language from the Tax Code to define the exemption:

> (a) EXEMPT CONDUCT. -- Except as provided in subsection (b), it shall not be unlawful under any of the antitrust laws, or under a State law similar to any of the antitrust laws, for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501 (c)(3)) that are exempt from taxation under section 501(a) of such Code to use, or agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

As I thought I made clear in the September 30, 1996 opinion and other orders, the issue wasn't then nor is it now whether a legitimate charity (as Congress chose to define it) is exempt. Certainly a legitimate 501(c)(3) charity is exempt. The issue was and remains whether or not a given defendant in this case meets the test for exemption as set forth in the Relief Act. Petitioners refused to deal with that obvious issue before me and they continue to ignore it before this Court.

The petitioners make much of the fact that the Relief Act was unanimously passed. I was unaware that the vote totals by which a bill was passed is an element of statutory construction of the resulting statute. I was confirmed, unanimously, by the U.S. Senate but I have never considered my judicial pronouncements to be more authoritative as a result. The fact that this is a major argument of petitioners, that the vote by which a bill passes somehow tells us what the statute means is, charitably speaking, a non-sequitur.

Even a cursory analysis reveals that the ramifications of the petitioners' proposed interpretation of the exemption are truly incredible. If petitioners' arguments were accepted, logically *any* antitrust defendant could compel dismissal of an action by *merely claiming* to be a "charity" without presenting any competent summary judgment evidence.

I believe that many of the defendants are legitimate charities, as defined by the exemption language of the Relief Act. The Lutherans, Baptists, and Salvation Army are, I have no doubt, covered. However, as a judge, before I can so find, there must be *some evidence in the record.* Northwestern University did present such evidence, which I will discuss below. I have no idea whether some of the petitioners, such as Hay-Huggins Company, Inc. and Planned Giving Resources, are charities covered by the exemption. I would be very interested to see if two of the petitioners asking you to order me to dismiss the case against them, Gray, Plant, Mooty, Mooty and Bennett, *a Minneapolis law firm*, and Prerau & Teitell, *a New York law firm*, can prove by competent summary judgment evidence that they are "described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) that are exempt from taxation under section 501(a) of such Code."

Northwestern University's motion for summary judgment presented evidence that it is exempt under the Relief Act as I read the exemption. I denied the motion without prejudice because to grant it would have been premature under F.R.Civ.P. 56(f), as this Court has held in *Exxon Corp. v. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474, 1487 (5th Cir. 1995) and *Wichita Falls Office Assoc. v. Bank One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993) (reversing the Chief Judge of this district for "pulling out the rug from under" the party seeking such discovery). The plaintiffs at bar had a discovery standstill agreement and had not had an adequate opportunity to take discovery to oppose the motion, according to their sworn affidavit in opposition to Northwestern's summary judgment motion.

I have attached a representative copy of the orders denying pending summary judgment motions filed by the defendants. They were entered the same day as the order denying dismissal under 12(b)(6) and when read in conjunction with that order, as a whole and not selectively, it is clear that the sky is not falling. I denied the motions without prejudice and put the words "without prejudice" in

bold, because the defendants had not asserted the new exemptions under the Relief Act and I wanted to give them a chance to do so. My opinion and order made clear that if a defendant proved by competent summary judgment evidence that it was exempt, it would be dismissed.

I reset the trial months away anticipating that this case may very well go away at the summary judgment stage. Before I could issue a new scheduling order, however, the defendants filed the October appeal that, given my reading of the jurisdictional requirements for an interlocutory appeal, is frivolous. Five weeks later, only after briefing was ordered on the jurisdictional issue, the petition for writ of mandamus was filed.

Petitioners complain that this case is needlessly consuming precious charity dollars. Yet of the 30 volumes and 403 motions, briefs, and letters filed in the district court as of today, roughly 78% have been filed by the defense lawyers. Many are duplicative. Many do nothing to advance the ball. I sought to address this very concern on September 30, 1996 by abating discovery as to everyone except the American Council on Gift Annuities. Yet the paper keeps flowing and the meter keeps running. There are 765 documents filed thus far in the district court and my docket sheet in this case rocks on for 116 pages.

The discovery and briefing necessary to establish in a summary judgment motion that the American Council on Gift Annuities is, as they claim, a legitimate charity exempt under the Relief Act would cost a fraction of the expense and take a fraction of the legal and judicial time this "appeal" and mandamus has taken *thus far*.

With regard to IRS determination letters, no one has ever said that these would not be probative. However, if Congress had wanted to provide that the granting of an IRS determination letter was the test for exemption they easily could have. Tax exempt status is determined by the Tax Code and one's compliance with its requirements, not solely by an unadjudicated administrative letter based on information supplied by the applicant.

Petitioners claim that the district court is attempting to "assert jurisdiction over the tax system" and "threatens to invalidate tax exempt status." This red herring was addressed in the September 30 opinion. If the district court doesn't have the ability to determine if an entity meets the test for exemption from the Sherman Act provided in the Relief Act, then pray tell who does?

In dicta I wrote that there is an issue of whether an exempt entity conspiring with a nonexempt entity would nevertheless vitiate the exemption. That issue was not squarely before me, but at first blush the plaintiffs' position seemed correct. After reading more cases and further consideration of the arguments I would now say I am not so sure of the plaintiffs' position. (If the mandamus relief requested is denied I would welcome an advisory opinion.)

In any event, what a judge might find at some point in the future, even erroneously, is not something that would call for the extreme measure of a mandamus of dismissal. This is especially so when dealing with issues as to whether other recognized antitrust principles should apply to a new statute and a case of first impression. This is obviously not a legal matter "of which there can be no doubt," as mandamus requires.

On May 3, 1995, I entered partial summary judgment on the state claims. After my ruling the Texas legislature "clarified" (their word, not mine) the law to in essence reverse my ruling. This Court can reverse me on appeal if I am wrong; the Texas legislature cannot.

Although the Texas Supreme Court has not addressed the issue, two state trial courts have opined on the subject, persuasive authority at best. Judge Lowry entered a conclusory opinion devoid of any legal analysis or reasoning. Judge Windle entered an interestingly worded order finding that the legislature had "retroactively changed the law." If his ruling is correct, then mine is correct as well. Otherwise, if I got it wrong on May 3, 1995, there would be no law that needed to be "retroactively changed."

What Judge Windle's opinion does not address and what the legislature very consciously sought to avoid by stating

they were merely "clarifying" what the law "had always been" as opposed to "retroactively changing it" is the Open Courts provision of Article 1, Section 13 of the Texas Constitution.

The Attorney General, the state amici and petitioners can't have it both ways. The legislature either *changed* the law and thus raised Texas constitutional problems in attempting to get rid of this suit, or if as they state, they *clarified* the acts of a previous legislature, they are attempting to usurp the third branch's function of judicial review.

With regard to the Texas Attorney General's intervention, once the partial summary judgment was granted (based on then-existing law) the state liability claims were gone and I felt he no longer had a dog in the fight, at least before me, making his requested intervention moot. The Attorney General concedes that if I had let him intervene, he would simply have joined the defendants' motions for summary judgment as to the Texas statutory claims. There was nothing in his fourteen filings to indicate that he intended to take any legal position different from those of the defendants, so I concluded there was no reasonable basis for a claim that his interests were not adequately represented. This case may need many things, but more lawyers filing more paper is not one of them.

What Is Really Going On Here

If the petitioners' view of statutory construction is correct, then we should have the Fifth Circuit law librarians cancel our subscriptions to U.S. Code and instead acquire the Congressional Record for our law libraries. While I say that with tongue in cheek, what is "law?" Is it statements and views expressed in debate during legislative process, or is law what the statute as enacted plainly says? Is third branch law embodied in written published opinions, or does it (or should it) consist also of arguments made during conference, or made in memos sent back and forth during the judicial process as a Court's decision and opinion takes shape? Should we look to these materials to explain or

supplement the plain wording of an opinion to demonstrate what a Court intended?

This case potentially involves a staggering sum of money. Charities are very sympathetic litigants; the plaintiffs are not. This case has generated a significant, well-orchestrated letter, editorial and PR campaign (some directed at me personally). No one, especially an elected politician, is against or will vote against this country's charities and their donors. Lobbyists and lawyers were hired to make this case go away legislatively. In the rush to kill this lawsuit, what they delivered was a statute that, when applied, was not what the lobbyists' clients apparently paid for. They are not going to take the fall because the case did not instantly disappear as they desired, and seek to have the judiciary ignore the plain meaning of the statute.

What was written and passed requires some proof of the stated 501(c)(3) elements for an exemption. This of course indicates some discovery would be appropriate. For some reason (the plaintiffs claim it is fraud) the American Council on Gift Annuities is fighting tooth and nail to prevent any discovery. One wonders why a legitimate charity with nothing to hide would oppose this, particularly when discovery has been abated as to everyone else.

From a personal, pragmatic and selfish standpoint, the granting of a mandamus ordering me to dismiss this case would be a blessing. This black hole of a case sucks up staff and judicial resources like no other case I have ever dealt with. Still, I am convinced that my dismissing or you ordering me to dismiss this case is not appropriate under the law and the record at this time.

Sincerely,
S/Joe Kendall
Joe Kendall
U.S. District Judge

EXCERPT OF POST-REMAND BRIEF OF APPELLANTS/PETITIONERS NORTHWESTERN UNIVERSITY, THE MOODY BIBLE INSTITUTE, THE AMERICAN BIBLE SOCIETY, AMERICAN LEPROSY MISSIONS, INC., LOMA LINDA UNIVERSITY, AND GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS (Filed January 7, 1998).

* * *

ARGUMENT

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IV. Any Continuing Request for Sanctions Should Be Denied.

Insofar as Richie continues to seek appellate sanctions, they should be denied. As demonstrated above, this is a meritorious appeal that should result in the reversal of the September 30 Order. Even if this appeal were not meritorious, however, imposing sanctions in this case of first impression would be inappropriate. *See, e.g.*, *McKnight v. General Motors Corp.*, 511 U.S. 659, 114 S.Ct. 1826, 1826 (1994) (meritless appeal was not sanctionable where Supreme Court had not previously ruled on question presented); *Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1174 (5th Cir. 1993) ("Sanctions are inappropriate if the issue is one of first impression.").

* * *

EXCERPT OF POST-REMAND REPLY BRIEF OF APPELLANTS/PETITIONERS NORTHWESTERN UNIVERSITY, THE MOODY BIBLE INSTITUTE, THE AMERICAN BIBLE SOCIETY, AMERICAN LEPROSY MISSIONS, INC., LOMA LINDA UNIVERSITY, AND GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS (Filed January 21, 1998)

* * *

ARGUMENT

* * *

III. The Court Should Deny Richie's Renewed Request for Sanctions.

Imposing appellate sanctions in any case of first impression is problematic, because it tends to "have a profound chilling effect upon litigants and . . . interfere with the presentation of meritorious legal questions . . . ." *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 795 (7th Cir. 1983). Where appellants press novel arguments in good faith, losing an appeal should rarely, if ever, justify sanctions. *See McKnight v. General Motors Corp.*, 114 S. Ct. 1826 (1994). In this case of first impression, where Congress has vindicated Appellants' arguments on appeal, imposing appellate sanctions clearly would be inappropriate.

A. Imposing Sanctions Would Defy Both Logic and Precedent.

In *McKnight v. General Motors Corp.*, 114 S. Ct. 1826 (1994) (per curiam), the Supreme Court held that an appeal, even if not meritorious, is not sanctionable where that "Court had not yet ruled on" the question presented and an appeal was necessary to preserve the question for review in that Court. At least eight of the Courts of Appeals, including the Fifth Circuit, have similarly held that imposing appellate sanctions in cases of first impression is inappropriate. *See, e.g., Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213 (6th Cir. 1997) (holding that appellate sanctions were inappropriate where "central issue was one of first impression"); *Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1174 (5th Cir. 1993) ("Sanctions are inappropriate if

the issue is one of first impression."); *Stebco, Inc. v. United States*, 916 F.2d 556, 558 (9th Cir. 1990) ("Because the reviewability of a district court's decision regarding venue in a §7429 proceeding is a question of first impression in this circuit, the government's attempt to appeal is not sanctionable conduct."); *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 n. 5 (11th Cir.) (declining to impose sanctions where "appeal present[ed] an issue of first impression in this circuit"), *cert. denied*, 490 U.S. 1107 (1989); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 749, 761 (1st Cir. 1988) (where appeal presented "important issues of first impression" in First Circuit, sanctions were "inappropriate"); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988) ("Given the previously unresolved state of the law in this Circuit concerning the question of appellate jurisdiction in consolidated actions, it would be improper to award sanctions against a party whose appeal raise[d] this issue for the first time."); *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 794 (7th Cir. 1983) (holding that appeal was not frivolous where issues "had never before been litigated under the Interstate Commerce Act"); *Asai v. Castillo*, 593 F.2d 1222, 1225 (D.C. Cir. 1978) (declining to impose sanctions where D.C. Circuit "had not previously addressed" issue presented by appeal). As the Seventh Circuit reasoned in *Overnite Transportation Company v. Chicago Industrial Tire Company*, 697 F.2d 789, 795 (7th Cir. 1983), "[l]itigants and their attorneys must be free to pursue their appellate remedies except in truly unmeritorious and frivolous cases." Thus, imposing sanctions in this case of first impression would defy both sound logic and abundant precedent.

* * *

Supreme Court, U.S.
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No. 98-977

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

THE AMERICAN BIBLE SOCIETY, et. al.

Petitioners,

vs.

BOYD L. RICHIE, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter, individually and on behalf of all others similarly situated,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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March 11, 1999

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari in this case regarding appellate sanctions when the Petitioner mischaracterizes the appeal by failing to mention the numerous issues appealed by Petitioners to the Fifth Circuit on which Petitioners failed to prevail?

2. Whether the Fifth Circuit clearly abused its discretion under Fed. R. App. P. 38 by imposing sanctions against Petitioners for immediately appealing and seeking mandamus for the District Court's denial their motion to dismiss Respondent's antitrust claims, denial of partial summary judgment on state law claims, and denial of various other interlocutory rulings, when fact issues existed as to the basic applicability of the antitrust exemption claimed and the other rulings unquestionably fell outside of the collateral order doctrine?

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Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter individually and on behalf of all others similarly situated ("Respondent" or "Plaintiff") opposes Defendants' Petition for Writ of Certiorari. Nothing about the award of sanctions against Petitioners merits review by the United States Supreme Court. In fact, Petitioners' glaring omissions from their Petition for Writ of Certiorari counsel against entertaining this appeal any further. Petitioners state that the United States Court of Appeals for the Fifth Circuit sanctioned them for appealing the District Court's refusal to dismiss their antitrust claims. But, in fact, Petitioners frivolously appealed and briefed many different rulings to the Fifth Circuit in this appeal and even invoked the more stringent mandamus jurisdiction in a massive endeavor to reverse those rulings. Defendants' entire conduct, as evidenced in the record, provided ample justification for sanctions. Aside from benefitting from a retroactive change in the law, Defendants utterly failed to obtain any relief on the other issues prosecuted by them in this appeal.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-8) is reported at 143 F.3d 937. The prior opinion of the Court of Appeals (Pet. App. 9-29) is reported at 110 F.3d 1082.The opinion of the District Court (Pet. App. 30-42) is reported at 943 F. Supp. 685. Petitioners also appealed the denial of summary judgment on issues covered in an earlier opinion of the District Court: *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D. Tex. 1995).

STATEMENT OF THE CASE

Petitioners begin by misrepresenting the basis for Respondents's claims as resting only on the Sherman Act. In fact, Respondent brought both federal and state law claims. Moreover Petitioners lost their appeals of the state law claims and of certain federal law issues. Yet, they still claim to have prosecuted a meritorious appeal without bothering to mention that but for the intervention of Congress, nothing about their appeals would have succeeded.

1. The Lawsuit

Plaintiff brought this lawsuit in December 1994 to redress numerous wrongs. Specifically, Plaintiff initially alleged that: (1) Defendants had conspired with each other to fix the rates of return on certain fixed-income products marketed by Defendants as investments; (2) certain Defendants had knowingly sold annuities in Texas when the state Insurance Commission had told them that their conduct was illegal; (3) certain Defendants also operated trust businesses and managed money for the general public when the State Banking Commission had told them that such conduct was also illegal; and (4) certain Defendants had committed numerous breaches of fiduciary duty against Plaintiff.

On March 14, 1995, the District Court denied a motion to dismiss brought by three defendants asserting that Defendants' challenged activities did not constitute trade or commerce under the Sherman Act. In fall of that year–six months after District Court's March 14, 1995 ruling on the motion to

dismiss–Defendants sought to have the issue of whether their conduct was trade or commerce under the Sherman Act certified for interlocutory appeal under § 1292, but the District Court denied the request. Defendants' failed attempt to certify the issue recognized the non appealable nature of the District Court's refusal to dismiss on the basis that the Defendants' conduct did not constitute trade or commerce under the Sherman Act. On May 3, 1995, the trial court granted partial summary judgment as to one Defendant's illegal sale of annuities and money management services to Plaintiff under Texas law. *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D. Tex. 1995).

2. The Intervening Legislation.

Subsequently, Defendants successfully lobbied for changes in applicable federal and state law. Congress passed the Charitable Gift Annuity Antitrust Relief Act (the "Antitrust Relief Act"), 15 U.S.C. § 37 (Supp. 1995) which made no mention of creating an immunity from suit, but rather provided a substantive defense on the merits to those who could meet its terms. It provided:

> [I]t shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) . . . that are exempt from taxation under section 501(a) . . . to use, or agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

Defendants also pushed through Texas legislation purportedly authorizing nonprofit organizations to sell annuities without being licensed to sell insurance and to operate trust businesses for the general public without being organized as trust companies. *See* TEX. BANKING CODE ANN. art. 342-1113(3); TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Texas Non-Profit Corporations Act); TEX. INS. CODE ANN. art. 1.14-1A § 2(a) and (b). Like the federal statute, the state statutes contained no mention of immunity from suit. Instead, they granted authority to engage in certain otherwise prohibited transactions and activities.

As a result of the new federal and state legislation, Defendants filed various motions to dismiss or for summary judgment based on the Antitrust Relief Act and the amended Texas statutes. Plaintiff opposed these motions and sought leave to amend his complaint to assert that Defendants were outside the scope of the laws or engaging in illegal activities that were outside the scope of the laws.

3. **Defendants' Frivolous Appeals to the Fifth Circuit.**

This activity culminated when the District Court ruled on the motions to dismiss and for summary judgment or partial summary judgment. *Richie v. American Council on Gift Annuities*, 943 F. Supp. 685 (N.D. Tex. 1996), *rev'd in part*, *Ozee v. American Council on Gift Annuities*, 143 F.3d 937 (5th Cir. June 12, 1998). The court:

1. denied Defendant Lutheran Foundation of Texas's October 26, 1995, Motion to Reconsider

the May 3, 1995, Order Granting Partial Summary Judgment;

2. denied Defendant American Council on Gift Annuities' and Defendant Lutheran Church Missouri Synod's November 22, 1995, Motion for Partial Summary Judgment on Texas Statutory Claims;

3. denied Defendants' December 14, 1995, Motion to Dismiss based on the Antitrust Relief Act;

4. denied Defendant Northwestern University's Motion for Summary Judgment on the Antitrust Relief Act filed January 26, 1996;

5. granted Plaintiff's February 13, 1996, Motion for Leave to File Fourth Amended Class Action Complaint;

6. denied Defendants' August 27, 1996, Renewed Motion for Relief based on the above motions; and

7. abated all discovery except that pertinent to whether the Council was entitled to the new antitrust exemption.

In different permutations, Defendants filed three notices of appeal regarding ruling numbers 2 through 6 of the District Court's rulings.

In the Fifth Circuit, all Defendants, including Petitioners, jointly filed an opening brief seeking review of both the federal and state issues raised by their appeals. They all joined in the same Statement of Jurisdiction invoking the rare "collateral order doctrine," claiming that jurisdiction existed because the order

denying their motion to dismiss under the Antitrust Relief Act (no. 3) and permitting the pleading amendment (no. 5) satisfied the three elements of the collateral order doctrine as an immunity from suit. This claim was particularly surprising because *nowhere* in their briefing on these issues before the District Court had Defendants asserted that the Antitrust Relief Act was an immunity from suit as opposed to an ordinary defense on the merits. Additionally, Defendants' Statement of Jurisdiction offered no basis for jurisdiction over the denial of the so-called Renewed Motion for Relief (no. 6), the motions for partial summary judgment on state law claims (no. 2), or Northwestern's partial summary judgment motion (no. 4). Thus, although Defendants purported to appeal rulings numbers 2, 3, 4, 5, and 6, the Statement of Jurisdiction alleged jurisdiction only as to rulings numbers 3 and 5.

Plaintiff moved to dismiss Defendants' appeals and sought sanctions because none of the rulings from which Defendants appealed constituted final judgments or collateral orders under 28 U.S.C. § 1291. All of the Defendants, including Petitioners, joined in opposing the Motion to Dismiss Defendants' Appeals and seeking to support this Court's jurisdiction over *all* of the issues raised in the various notices of appeal.

In addition to attempting to invoke appellate jurisdiction, Defendants, including Petitioners, sought mandamus in the Fifth Circuit attacking the same rulings, both state and federal, that were at issue in the direct appeal. Yet, as the Fifth Circuit

correctly held, none of the rulings approached the type of trial court abuse justifying such an extreme measure.

Accordingly, a panel consisting of Judges Reavley, Smith, and Emelio Garza (the "Fifth Circuit") dismissed Defendants' appeals and sanctioned Defendants in the amount of $15,000–less than fifteen percent of Plaintiff's costs and fees involved in responding to the appeals.[1] *See Ozee v. American Council on Gift Annuities, Inc.*, 110 F.3d 1082, 1097 (5th Cir.), *cert. granted*, 139 L. Ed. 2d 486, 118 S. Ct. 596, ___ U.S. ___ (1997) (*Ozee I*).

Defendants sought rehearing *en banc* of that ruling, which was denied. They sought a stay of the Fifth Circuit's mandate, which was also denied by both the Fifth Circuit and Justice Scalia. Shortly after these events, Congress passed the Charitable Donation Antitrust Immunity Act that, for the first time, actually gave Defendants an immunity from suit under the antitrust laws as opposed to the mere defense to liability provided by the prior law. The Supreme Court granted certiorari, vacated *Ozee I*, and remanded the case to the Fifth Circuit for reconsideration in light of the new law. *American Bible Soc'y v. Richie*, 139 L. Ed. 2d 486, 118 S. Ct. 596, ___ U.S. ___ (1997).

The Fifth Circuit then ordered additional briefing on the new law. Plaintiff conceded that the new law applied to this case

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[1]At oral argument, the Fifth Circuit requested that Plaintiff submit a summary of its attorney time and expenses for use by the court in assessing possible sanctions. At that time, Plaintiff's attorneys had incurred approximately $125,000.00 in attorney's fees and expenses responding to Defendants' ill-fated appeal.

but sought reimposition of sanctions for Defendants' conduct prior to the change in the law and other conduct not affected by the new law. On June 7, 1998, the Fifth Circuit issued its opinion on remand. *Ozee v. American Council on Gift Annuities, Inc.*, 143 F.3d 937 (5th Cir. June 12, 1998) (*Ozee II*). In that opinion, the Fifth Circuit dismissed Plaintiffs' antitrust claims, but it refused to consider the state law claims and reimposed the $15,000 sanctions on all thirty-two Defendants.

The Fifth Circuit noted that frivolity should be measured by the law in effect at the time of the sanctionable conduct. Under that law, "their appeal was frivolous under the plain statutory language that existed at the time." Moreover, even if the Fifth Circuit had applied the new law, Defendants' invocation of pendent jurisdiction over the state law issues appealed by them was frivolous as was their attempt to seek mandamus. Accordingly, the Fifth Circuit properly sanctioned Petitioners and review by certiorari would not be proper.

REASONS FOR DENYING THE PETITION

The present case does not merit granting review by writ of certiorari of the sanctions awarded against Defendants because decisions of the United States Supreme Court and the Fifth Circuit permitted sanctions in this case. Additionally, the sanctions in issue did not rest solely on issues of "first impression," but rather involved well-established principles regarding the collateral order doctrine. And regardless of whether an issue of first impression appeared somewhere in these appeals, numerous alternate reasons existed for sanctioning Defendants, not just those allegedly involving questions of first impression.

1. The Fifth Circuit's Sanctions of Petitioner Complied with Supreme Court Precedent.

Petitioners misconstrue *McKnight v. General Motors, 511 U.S. 659 (1994)* and ignore *Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987)* in their futile effort to create a conflict between their sanctions and Supreme Court precedent. Moreover, Petitioners trumpet a nonexistent rule against sanctioning parties in "cases of first impression" in another effort to create conflict.

Defendants make a futile effort to extrapolate *McKnight v. General Motors* into a broad general rule prohibiting sanctions in cases of first impression. But that case does not so hold. According to this Court, "Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals ... ." *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 8 (1987). An

"appellant does not have to conduct an appeal in a manner sanctioned in other cases in order for us to view the appeal as necessarily lacking plausible argument following a clean disposition of the issues by the district court." *Coghlan v. Starkey*, 852 F.2d 806, 815 (5th Cir. 1988).

Defendants do not address this point, but instead advocate a rule prohibiting sanctions in all cases of "first impression." But neither the Supreme Court nor the Fifth Circuit require that approach. Petitioners incorrectly rely on several Fifth Circuit cases and a *McKnight* for the proposition that *all* cases involving issues of first impression preclude sanctions under Federal Rule of Appellate Procedure 38. No rule of "first impression immunity" exists under Rule 38, and this Court should not create one.

Defendants' citation to *McKnight v. General Motors Corp.*, 511 U.S. 659 (1994) is inapposite. Nowhere in *McKnight* can one find the broad pronouncement advocated by Defendants that a meritless appeal under circuit precedent is not sanctionable in the absence of controlling Supreme Court precedent. Under this erroneous view of sanctions, Petitioners reject the Fifth Circuit's view that their appeal "was frivolous under the plain statutory language that existed at the time." *OzeeII* (Pet. App. at 7). Ironically, in light of Defendants' reliance on Congress to rid them of this antitrust suit, Defendants' view of *McKnight* would preclude a court from imposing sanctions in a circumstance in which Congress had written a law about which a party advocated a frivolous interpretation unless the Supreme Court had specifically rejected

that frivolous interpretation. Were this the law, Plaintiff could have advocated that the Charitable Donation Antitrust Immunity Act of 1997 provided no immunity from suit and could not have been sanctioned until the Supreme Court rejected that interpretation.

In reality, *McKnight* narrowly held that an issue over which other courts are divided and on which the Supreme Court has not ruled may not be the "only basis" for an order imposing Rule 38 sanctions. It plainly did not address cases of alleged "first impression," but rather dealt with cases of "unsettled" law. And it certainly did not create any sort of general rule that, in all cases involving issues of first impression, a court may not impose sanctions under Rule 38.

With respect to Fifth Circuit precedent, Defendants assert that *Estiverne v. Salk's Fifth Avenue*, 9 F.3d 1171 (5th Cir. 1993); *Ehm v. Amtrak Bd. of Directors*, 780 F.2d 516 (5th Cir. 1986); and *Adult Film Ass'n v. Thetford*, 776 F.2d 113 (5th Cir. 1985), hold that imposing Rule 38 sanctions in cases of first impression is improper. While these cases did cite to either the novelty of a legal question or its "first impression" status, they do not adequately support that general rule. At least one Fifth Circuit case imposed sanctions in a case in which the appellant made at least one novel argument. *See Shinn v. College Station I.S.D.*, 96 F.3d 783 (5th Cir. 1996).

In the end, the first impression immunity from sanctions advocated by Petitioners cannot be squared with this Court's Rule 38 jurisprudence. It requires that Rule 38 sanctions be determined on a case-by-case basis. *Burlington Northern R.R. v.*

Woods, 480 U.S. 1, 8 (1987). Under this approach, the question is not whether one of the issues on appeal involved a question of first impression, but whether the appellant's conduct was sanctionable. *Anderson v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495 (7th Cir. 1993) (imposing sanctions even though the question was "a novel one in this circuit"); *see Reliance Ins. v. Sweeny Corp.*, 792 f.2d 1137 (D.C. Cir. 1986) (sanctioning appellant for asserting a "novel position").

Appellate sanctions serve the important roles of compensating parties for the harm resulting from frivolous appeals and of preventing the waste of judicial resources by deterring frivolous appeals. *See Coghlan v. Starkey*, 852 F.2d 806, 815 (5th Cir. 1988); *Stelly v. Commissioner*, 761 F.2d 1113, 1115-1116 (5th Cir.), cert. denied, 474 U.S. 851 (1985). A rule of "first impression immunity" advocated by Defendants would contravene both of these polices. "A claim that is utterly insupportable may be sanctionable even if the circuit has not addressed the issue." *United States v. Alexander*, 981 F.2d 250, 253 (5th Cir. 1993). In the absence of such a rule, an obviously frivolous but untried legal argument of "first impression" would not be sanctionable. And that result would impair the integrity of the legal profession and the administration of justice.

2. The Fifth Circuit Properly Looked at the Law as it Existed at the Time of Petitioners' Frivolous Appeals to Judge Sanctions.

Petitioners next contend that the Fifth Circuit's use of the law as it existed at the time of the original appeal rather than as subsequently amended conflicts with this Court's precedent in *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed 49 (1801) and earlier remand in this case. This argument by Petitioners mistakes the requirement that retroactive laws be applied retroactively for one that would require a court assessing sanctions to change the *underlying facts* of the sanctionable conduct once the law on which a sanctionable appeal was ostensibly based was amended. In this situation, the law in effect when the sanctionable act occurred becomes a fact that cannot be changed. Petitioners can site to no precedent that permits Congress to change the facts of a case. Moreover, any amendment to the Sherman Act subsequent to the Petitioners' sanctionable appeal did not amend the law to be applied when determining appellate sanctions - Federal Rule of Appellate Procedure 38.

3. The Sanctions did not Rest on "Issues of First Impression," but Rather Defendants Advanced Arguments in the Face of Well-established Precedent Resulting in Sanctions.

Certiorari should also be denied because a fundamental aspect of Petitioners' request rests on the vague and unspecified assertion that the award of sanctions in *Ozee I* and *Ozee II* rested on "issues of first impression." It appears that Defendants'

assertion that sanctions were based upon "issues of first impression" refers to the fact that at some level, the case involved the construction of the Antitrust Relief Act. Prominently missing from Petitioners' Petition for Writ of Certiorari is an identification of exactly what "issues of first impression" precluded sanctions.

While the Fifth Circuit's initial ruling did address the collateral order issues in the context of a new statute, Defendants' claims "were advanced in the teeth of firmly established rules of law for which there is no arguably reasonable expectation of reversal or favorable modification." *Simon & Flynn, Inc. v. Time, Inc.*, 513 F.2d 832, 835 (2d Cir. 1975). And the sanctions rested on these principles and not just the meaning of the new statute.

For example, an appealable collateral order does not exist unless the ruling conclusively determines the matter. *Swint*, 115 S. Ct. 1203; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As the Fifth Circuit recognized, the District Court's rulings were expressly without prejudice to further consideration of the matters. The Fifth Circuit also found that Defendants "failed to come to grips" with the well-established rule that fact issues pertaining to an alleged immunity may not be appealed under the collateral order doctrine. Similarly, although not directly mentioned by the Fifth Circuit, Defendants' ignored the recent, but well established rule set forth in *Swint*, that appellate jurisdiction pendent to a collateral order would only be permitted in extremely limited circumstances. As a result, the Fifth Circuit properly sanctioned Defendants for

advocating untenable positions in the face of well-established precedent.

4. Numerous Aspects of these Appeals, Other than the So-called "Issues of First Impression," Justified Rule 38 Sanctions.

Defendants misdirect the Court and ignore the procedural history of this case by asserting that the Fifth Circuit improperly based its sanctions only on alleged "issues of first impression." In *Ozee I*, the Fifth Circuit properly found, based on applicable Fifth Circuit case law, that Defendants' were pursuing "legal points not arguable on the merits" or points "in which the result [was] obvious." *Ozee I*, 110 F.3d at 1097. Among other things, the Fifth Circuit expressly based these findings on the fact that Defendants failed to make a "thorough examination of ... the decision being appealed" and failed to make a "thorough examination of the rules governing ... appellate jurisdiction." *Ozee I*, 110 F.3d at 1097; *see id.* (stating, "It defies reality for the defendants to continue to argue that they can collaterally appeal the District Court's ruling in the face of its true basis."). Even in *Ozee II*, the Fifth Circuit stated, "We sanctioned the defendants under FED. R. APP. P. 38 for filing a frivolous appeal, noting that in pursuing their collateral appeal, the defendants had blithely ignored the nature of the claim and the basis of the District Court's ruling." *Ozee v. American Council on Gift Annuities, Inc.*, 143 F.3d 937 (5th Cir. 1998). Thus, in both opinions, the sanctions are not necessarily tied to the meaning of the new law.

Indeed, many different aspects of Defendants conduct justified imposing sanctions. For example, Defendants appealed from the March 14, 1995 District Court ruling that gift annuities were not trade or commerce under the Sherman Act which preceded the appeals by more than eighteen months. In fact, the District Court had already refused to certify an interlocutory appeal on that very issue. By attempting that interlocutory appeal, Defendants had already acknowledged the non final nature of the District Court ruling, but they sought to use the avenue of a "Renewed Motion for Relief" to get another bite at the appellate apple. Such tactics are precisely the sort of conduct at which courts direct Rule 38 sanctions.

Defendants also appealed the District Court's denial of partial summary judgment on Plaintiff's state law claims for illegally selling annuities or operating trust businesses. No plausible interpretation of the revised Texas statutes existed to create an immediately appealable immunity from suit, and the doctrine of pendent appellate jurisdiction clearly did not support jurisdiction over these issues in this appeal. *Swint v. Chambers County Comm'n.*, 115 S. Ct. 1203, 1208 (1995). Defendants, including Petitioners, weakly invoked pendent appellate as "arguably" supporting jurisdiction for review of the state law issues by citing *Swint*, 115 S.Ct. at 1212. *Swint*, however, clearly rejected the notion that appellate courts have pendent jurisdiction over independently non appealable issues or parties, except possibly in extremely narrow circumstances: if the non appealable order is "inextricably intertwined" with the appealable one, or if review of the former is "necessary to ensure

meaningful review of the latter." *Id.* In *Swint*, the Court denied pendent appellate jurisdiction when the immunity issue turned on federal law and the non appealable ruling turned on state law–even though the issues arose from the same conduct. *Id.* at 1212. In the present case, Defendants asserted, but did not cite to any authority, that by alleging Defendants' conduct violated both state and federal law, the claims were "inextricably intertwined"–the very argument rejected in *Swint*. Moreover, they made *no attempt* to establish that review of the state law issues was "necessary to ensure meaningful review" of the antitrust exemption issues. *Swint*, 115 S. Ct. at 1212.

Moreover, a cursory reading of the Fifth Circuit's opinion in *Ozee I* reveals its frustration with Defendants' meritless appeals. For example, with respect to Defendants' ill-conceived mandamus request, the Fifth Circuit stated, "Most of the petition simply recycles the arguments of defendants' appeal in the substantially stricter mandamus context." *Ozee I*, at 1093. With respect to the state law issues raised by Petitioners, the Fifth Circuit opined, "The summary judgment they complain of is addressable both through certified appeal under 28 U.S.C. § 1292(b) and through direct appeal after final judgment. The grant of summary judgment was neither an abuse of discretion nor a `usurpation of power,' and whatever right petitioners might have to relief on the merits is far from being `clear and indisputable.'" *Id.*

Petitioners arrogantly assert that they advanced a successful appeal as some sort of shield against the sanctions. In reality, Petitioners advocated frivolous positions and lost their

appeal with respect to the state law claims. With respect to the federal claims, they failed with regard to their appeal of whether charitable gift annuities are trade or commerce under the Sherman Act, and it was only the intervention of Congress that obtained the result sought by Defendants. Any "success" certainly did not rest on the sanctionable arguments initially advanced by them.

Finally, even a party that is successful in one part of an appeal may be properly sanctioned under Rule 38. "The rule authorizes the imposition of sanctions for the part of an appeal that is frivolous even if the presence of a colorable ground prevents the entire appeal from being adjudged frivolous." *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1200 (7th Cir. 1987); *see McEnery v. Merit Systems Protection Bd.*, 963 F.2d 1512, 1516-17 (Fed. Cir. 1992); *In re Perry*, 918 F.2d 931, 935 (Fed. Cir. 1990).

In sum, the other frivolous aspects of Defendants' appeals provided ample basis in the record for the Fifth Circuit to have awarded sanctions on any number of grounds in the first instance and to subsequently reimpose them. Since Petitioners have not explained why the United States Supreme Court should grant review in light of the entire record of sanctionable conduct, the Court should deny Petitioners' Petition for Writ of Certiorari.

CONCLUSION

For these reasons, the Petitions for Writ of Certiorari should be denied.

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IN THE

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OCTOBER TERM, 1998

THE AMERICAN BIBLE SOCIETY, *et al.*,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

CERTAIN RESPONDENTS' BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The Respondents submitting this response are Anderson University, Inc. d/b/a Anderson University, Mount Holyoke College, Smith College, Vassar College, St. Olaf College, Wittenberg University, Northwestern University, The Salvation Army, a New York Corporation, The Salvation Army, a Georgia Corporation, The Salvation Army, a California Corporation, The Salvation Army, an Illinois Corporation, United Church of Christ, Good Shepherd Home Foundation and Gray, Plant, Mooty, Mooty & Bennett. These respondents were among the Defendants-Appellants in the Court of Appeals.

Petitioners are The American Bible Society, The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, American Leprosy Missions, Inc., The Lutheran Church-Missouri Synod, The Texas District, Lutheran Church-Missouri Synod, The Lutheran Foundation of Texas, Baptist Foundation of Texas, American Baptist Foundation, American Baptist Foreign Mission Society, The Evangelical Lutheran Church in America, General Conference Corporation of Seventh-Day Adventists d/b/a General Conference of Seventh-Day Adventists, Loma Linda University, University of Colorado Foundation, Inc., The American Council on Gift Annuities, Inc., Planned Giving Resources, Prerau & Teitell, Planned Giving Services, Inc., d/b/a Planned Giving Services, and Hay/Huggins Company, Inc., which were among the Defendants-Appellants below.

Respondent Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, was Plaintiff-Appellee in the Court of Appeals.

The other parties to the proceedings in the Court of Appeals were Defendant-Appellant Southern Baptist Convention and Appellant the Attorney General of the State of Texas.

CORPORATE DISCLOSURE STATEMENT

None of these Respondents has any parent or non-wholly owned subsidiary companies.

CERTAIN RESPONDENTS' BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

Respondents Anderson University, Mount Holyoke College, Smith College, Vassar College, St. Olaf College, Wittenberg University, Northwestern University, The Salvation Army, a New York Corporation, The Salvation Army, a Georgia Corporation, The Salvation Army, a California Corporation, The Salvation Army, an Illinois Corporation, United Church of Christ, Good Shepherd Home Foundation and Gray, Plant, Mooty, Mooty & Bennett respectfully support Petitioners in requesting a writ of certiorari to review the June 12, 1998, order of the United States Court of Appeals for the Fifth Circuit sanctioning Petitioners and these Respondents under FED. R. APP. P. 38.

STATEMENT OF THE CASE

As stated in the Petition for Writ of Certiorari, this case arises from the claim that charities violated the Sherman Act by conspiring to fix rates of return for charitable gift annuities. Although the Fifth Circuit rendered judgment dismissing that claim with prejudice, a live controversy remains concerning the Fifth Circuit's order sanctioning Petitioners and these Respondents in the amount of $15,000.00 for bringing a meritorious and successful appeal. Pet. App. at 1-8. For the sake of brevity, and to avoid repetition, these Respondents adopt and incorporate Petitioners' statement of the case.

REASONS TO GRANT THE WRIT

These Respondents agree with Petitioners that at least three reasons justify review of the Fifth Circuit's order sanctioning prevailing appellants for bringing a meritorious and successful appeal presenting important issues of first impression.

First, the Fifth Circuit's conclusion that FED. R. APP. P. 38 authorizes sanctions in cases of first impression (Pet. App. at 1-7) conflicts directly with *McKnight v. General*

Motors Corporation, 511 U.S. 659 (1994) (per curiam), and with several decisions of the United States Courts of Appeals, including three decisions of the Fifth Circuit.

Second, the Fifth Circuit's decision to judge the alleged frivolity of this appeal by reference to the Charitable Gift Annuity Antitrust Relief Act of 1995, Pub. L. No. 104-63, 109 Stat. 687 (1995), rather than the Charitable Donation Antitrust Immunity Act of 1997, Pub. L. No. 105-26, 111 Stat. 241 (1997) (*see* Pet. App. at 6-7), conflicts with this Court's decision in *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801), which requires federal courts to decide cases according to existing laws, and with the Court's decision in *American Bible Society v. Richie*, 118 S. Ct. 596 (1997) (per curiam), which directed the Fifth Circuit to reconsider this case in light of the 1997 Act.

Third, the Fifth Circuit's determination that this appeal was frivolous when filed because the 1995 Act "obvious[ly]" did "not reach conspiracies involving both exempt and non-exempt entities" (Pet. App. at 7, 27-29) is an abuse of discretion justifying an exercise of the Court's supervisory power.

For the sake of brevity, and to avoid repetition, these Respondents adopt and incorporate Petitioners' arguments concerning these three compelling reasons to grant the writ.

CONCLUSION

For the reasons stated above and explained in the Petition, these Respondents respectfully support Petitioners' request for a writ of certiorari to review the June 12, 1998, order of the United States Court of Appeals for the Fifth Circuit imposing sanctions under FED. R. APP. P. 38. If the Court deems argument to be unnecessary, the Court should grant the writ and summarily reverse the sanctions in accordance with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam).

March 11, 1999

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Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S, THE ATTORNEY GENERAL OF TEXAS, BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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March 24, 1999

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PARTIES TO THE PROCEEDING

The Respondent submitting this response is the Attorney General of Texas. This Respondent was an Appellant in the Court of Appeals.

Other Respondents are Anderson University, Inc., d/b/a Anderson University, Mount Holyoke College, St. Olaf College, Smith College, Vassar College, Wittenberg University, Good Shepherd Home Foundation, Northwestern University, The Salvation Army, a New York Corporation, The Salvation Army, a Georgia Corporation, The Salvation Army, a California Corporation, The Salvation Army, an Illinois Corporation, United Church of Christ, Good Shepherd Home Foundation, and Gray, Plant, Mooty, Mooty & Bennett. These Respondents were among the Defendants-Appellants in the Court of Appeals.

Petitioners are The American Bible Society, The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, American Leprosy Missions, Inc., The Lutheran Church-Missouri Synod, The Texas District, Lutheran Church-Missouri Synod, The Lutheran Foundation of Texas, Baptist Foundation of Texas, American Baptist Foundation, American Baptist Foreign Mission Society, The Evangelical Lutheran Church in America, General Conference Corporation of Seventh-Day Adventists d/b/a General Conference of Seventh-Day Adventists, Loma Linda University, University of Colorado Foundation, Inc., The American Council of Gift Annuities, Inc., Planned Giving Resources, Prerau & Teitell, Planned Giving Services, Inc., d/b/a Planned Giving Services, and Hay/Huggins Company, Inc., which were among the Defendants-Appellants in the Court of Appeals.

Respondent Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, was Plaintiff-Appellee in the Court of Appeals.

The other party to the proceedings in the Court of Appeals was Defendant-Appellant Southern Baptist Convention.

QUESTION PRESENTED

The Attorney General of Texas agrees with Petitioners' presentation of their single question for review.

RESPONDENT'S, THE ATTORNEY GENERAL OF TEXAS, BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

An appearance and waiver form was filed in this matter on behalf of the Attorney General of Texas.

As previously noted by letter of November 5, 1997, Re: No. 97-309, *American Council on Gift Annuities, et al., v. Boyd L. Richie*, and No. 97-314, *American Bible Society, et al. v. Boyd L. Richie*, the Attorney General of Texas won his appeal in the United States Court of Appeals for the Fifth Circuit on a procedural question of intervention and no party challenged the Fifth Circuit's decision allowing the Attorney General to intervene. The Attorney General's intervention was not an issue addressed in previous Petitions for Writ of Certiorari, nor is it currently an issue addressed in the Petition for Writ of Certiorari here.

Although deemed a Respondent under Rule 12.6 of the Rules of the Supreme Court, the Attorney General has previously supported the positions of Petitioners regarding the legal issues raised in prior Petitions for Writ of Certiorari. The sanctions issue is not an issue in which the Attorney General has been involved. The Attorney General of Texas does have an interest in protecting the Texas general public's ability to contribute to charities and represents the public interest in proceedings involving charitable trusts, such as this case.

STATEMENT OF THE CASE

This Respondent agrees with Petitioners' Statement of the Case.

REASONS TO GRANT THE WRIT

This Respondent has no opposition to Petitioners' delineation of reasons to grant the writ of certiorari in this case.

CONCLUSION

For the reasons stated above, this Respondent has no opposition to Petitioners' request for a writ of certiorari to review the June 12, 1998 order of the United States Court of Appeals for the Fifth Circuit imposing sanctions under FED. R. APP. P. 38.

March 24, 1999

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On Petition for Writ of Certiorari to the
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Petitioners respectfully submit this reply to the Brief in Opposition filed by Respondent Boyd L. Richie.

1. Richie's First-Impression Points Are Meritless.

Richie asserts that "the sanctions in issue [do] not rest solely on issues of 'first impression'" and that "[n]o rule of 'first impression immunity' exists . . . ." Br. in Opp. at 9, 10; *see also id.* at 9-12, 13-15. Richie is mistaken.

A. The Sanctions Rest on Issues of First Impression.

The Fifth Circuit's opinions of April 1997 and June 1998 base the award of sanctions solely on Petitioners' failure to recognize as "obvious" the never-before-litigated proposition that Richie's allegation of a "hybrid" conspiracy involving "non-exempt" entities not only justified the district court's denial of their motions to dismiss Richie's antitrust claims pursuant to the Charitable Gift Annuity Antitrust Relief Act of 1995 ("the 1995 Act"), but also deprived the Fifth Circuit of jurisdiction to review that denial. PA at 4, 7, 27-28. Indeed, the court's June 1998 discussion of "first impression immunity," *id.* at 7, concedes, at least implicitly, that the sanctions rest squarely on issues of first impression.

B. The Rule of "First Impression Immunity" Exists.

Apart from his meritless contention that the sanctions do not rest on issues of first impression, Richie makes no effort to deny that the decision below conflicts with prior decisions of the First, Second, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits barring Rule 38 sanctions in cases of first impression. Although he describes the so-called "rule of 'first impression immunity'" as "nonexistent," Br. in Opp. at 9, he discusses none of the cases Petitioners cite for the proposition that the First, Second, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits follow such a rule. He does assert, without explanation, that Petitioners' Fifth Circuit cases "do not adequately support [the] general rule" that "imposing Rule 38 sanctions in cases of first impression is improper." Br. in Opp. at 11. But his

only authority for that assertion, *Shinn v. College Station I.S.D.*, 96 F.3d 783 (5th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997), neither discusses nor implicates that rule. *See id.* at 785-87 (sanctioning appeal foreclosed by authority holding that a person cannot recover under 42 U.S.C. § 1983 without pleading a deprivation of a constitutionally protected right). Thus, Richie does nothing to refute Petitioners' contentions that the decision below creates intercircuit and intracircuit conflicts meriting review.

C. Richie Misreads *McKnight*.

At page 11 of his Brief, Richie asserts that the decision below does not conflict with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), because "*McKnight* narrowly held that an issue over which other courts are divided and on which [this] Court has not ruled may not be the 'only basis' for an order imposing Rule 38 sanctions." Again, Richie is mistaken.

Reading *McKnight* to bar Rule 38 sanctions only when the lower courts are divided on the issue presented ignores *McKnight's* emphasis that "[f]iling an appeal was the only way petitioner could preserve the issue [presented] pending a possible favorable decision by this Court." 511 U.S. at 660. An appeal is just as necessary to preserve an appellant's rights in the event of a favorable decision in this Court when the appellant is the first to raise an issue as when she is the tenth, twentieth, or hundredth. Further, a split of authority below has never been a prerequisite to review in this Court. Thus, while a division among the lower courts clearly provides grounds for denying sanctions, the absence of such a division is irrelevant to *McKnight's* concern for protecting appellants while their issues of first impression percolate up to this Court. To further "the policy of not discouraging meritorious appeals," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 408 (1990), *McKnight* bars Rule 38 sanctions where, as here, an appeal is necessary to preserve an issue of first impression for decision in this Court. *See Turgeon v. Premark Int'l, Inc.*, 87 F.3d 218, 224 (7th Cir. 1996) (Rovner,

J., concurring in part and dissenting in part) (*McKnight* "held that sanctioning an appellant for filing a frivolous appeal was improper where the Court had not yet ruled on the issue . . . raised."). Thus, the decision below conflicts directly with *McKnight*.[1]

2. The Sanctions Also Conflict with *Schooner Peggy*.

Richie's assertion that *United States v. Schooner Peggy*, 1 Cranch 103 (1801), does not apply because the Charitable Donation Antitrust Immunity Act of 1997 ("the 1997 Act") did not amend Rule 38, *see* Br. in Opp. at 13, is meritless.

Just as Federal Rule of Civil Procedure 12(b)(6) allows a district court to dismiss a complaint that fails to state a claim upon which relief can be granted, Rule 38 allows a court of appeals to sanction an appeal that is frivolous. Moreover, just as a district court applying Rule 12(b)(6) to a particular motion must examine the applicable substantive rules of decision to determine whether the complaint states a claim on which relief can be granted, a court of appeals applying Rule 38 to an appeal from the district court's denial of that motion must examine the same substantive rules of decision to determine whether the appeal is frivolous. And, just as the 1997 Act altered ~~the rule of~~ decision applicable to Petitioners' motion to dismiss Richie's antitrust claim under

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[1]Contrary to the assertions at pages 9-12 of Richie's Brief, nothing in *Burlington Northern Railroad Company v. Woods*, 480 U.S. 1 (1987), affects the *McKnight* analysis.

Burlington Northern involves the question "whether, in diversity actions, federal courts must apply a state statute that imposes a fixed penalty on appellants who obtain stays of judgment pending unsuccessful appeals." 480 U.S. at 2. The "case-by-case" language on which Richie relies merely draws a distinction between discretionary sanctions under Rule 38 and mandatory penalties under state law. It hardly supports Richie's notion that Rule 38 must be applied on a totally *ad hoc* basis, untethered by rules of general application.

Moreover, it is neither illogical nor unusual for courts to resolve issues on a case-by-case basis within parameters established by broad rules of general application. Indeed, the abuse-of-discretion standard of review necessarily assumes that rules of general application govern such case-by-case exercises of discretion in the lower courts.

Rule 12(b)(6) and changed what had been, in Richie's view, a claim on which relief could be granted into a claim on which relief cannot be granted, the 1997 Act also altered the rule of decision applicable to Petitioners' appeal from the denial of that motion to dismiss and changed what had been, in Richie's view, a frivolous appeal into a non-frivolous, successful appeal. Richie's notion that the 1997 Act could alter the propriety of dismissal without amending Rule 12(b)(6) but not the propriety of sanctions without amending Rule 38 finds support neither in law nor in logic.

Worse, Richie misses the point. Common sense and plain English compel the conclusion that this appeal cannot be both successful and frivolous. The lower court's naked assertion that it "do[es] not agree," PA at 7, can overcome neither this simple truth nor *Schooner Peggy*.[2]

3. Nothing in the Record Counsels Against Review.

As demonstrated *supra* at 1, the record belies Richie's claim that the sanctions actually rest on something other than an issue of first impression. It also refutes Richie's claim that the sanctions could have rested on other grounds.

The Fifth Circuit's April 1997 and June 1998 opinions clearly contradict Richie's assertion that the sanctions could properly rest on Petitioners' appeals of various pendent issues. The April 1997 decision never reached the question whether jurisdiction existed over the additional issues of state and federal law that some of the Petitioners appealed under the doctrine of pendent-issue appellate jurisdiction. Reaching that issue was unnecessary because the court concluded that it lacked *Cohen* jurisdiction of Petitioners' principal appeals from the denial of their motions to dismiss Richie's antitrust claims under the 1995 Act. *See* PA at 18. Thus, the April 1997 decision contained no holding on which

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[2]Richie makes no effort to address the argument at pages 9, 14-16 of the Petition that the Fifth Circuit's decision to judge the alleged frivolity of this appeal by reference to the 1995 Act rather than the 1997 Act also violates this Court's mandate in *American Bible Society v. Richie*, 118 S. Ct. 596 (1997) ("*American Bible Society I*").

to base Richie's conclusion that the appeals of pendent issues were independently sanctionable. Further, the June 1998 decision resolved the pendent issues favorably to Petitioners by (a) denying Richie's motion to dismiss Petitioners' appeals, (b) granting all the relief requested by the appeals of pendent federal issues (dismissal of Richie's antitrust claim), and (c) granting limited relief with respect to the pendent state issues: a "remand to the district court for the limited purpose of determining whether any state law claims survive" in light of the dismissal of Richie's antitrust claim and the terms of 28 U.S.C. § 1367(c). PA at 5-6, 7-8 n.7. Thus, the record contradicts Richie's assertion that some Petitioners' appeals of pendent issues justify the sanctions and diminish the need for review.[3]

The record also disproves Richie's assertion that Petitioners' request for a writ of mandamus provides a defensible basis for the sanctions. *American Bible Society I* vacated the Fifth Circuit's April 1997 denial of Petitioners' request for mandamus, and the Fifth Circuit declined to reach the mandamus issue after remand. *See* 118 S.Ct. 596; PA 7-8 n.7. Moreover, Richie moved for sanctions only in connection with Petitioners' appeals and not in connection with the petition for mandamus. Thus, the petition for mandamus clearly cannot sustain the sanctions.

More importantly, the decision whether to review the sanctions order in this case should turn on the precedential effect of what the Fifth Circuit actually held, as reflected in the June 1998 opinion the Fifth Circuit actually issued.

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[3]Moreover, as Richie conceded at page 6 of his Motion to Dismiss Appellants' Appeals (filed Dec. 6, 1996), several Petitioners appealed only the district court's denial of their motion to dismiss and the inextricably intertwined decision to allow Richie to file the amended complaint raising the issues on which the court relied to deny that motion. Such appeals clearly were not sanctionable. *Swint v. Chambers County Commission*, 514 U.S. 35, 51 (1995) (renouncing doctrine of pendent-party appellate jurisdiction but leaving open possibility of pendent-issue appellate jurisdiction of issues inextricably intertwined with issue immediately appealable under the collateral-order doctrine).

Later courts will not have Richie's allegations of other purported misconduct to help them apply the Fifth Circuit's reasoning to subsequent appeals. Thus, this Court should review the sanctions unless the June 1998 opinion, unadorned by other allegations, properly applies an appropriate standard for imposing Rule 38 sanctions in cases of first impression. As stated in the Petition for Writ of Certiorari, that opinion applies no such standard.[4]

CONCLUSION

For the reasons stated above and in their Petition for Writ of Certiorari, Petitioners respectfully request that the Court review and reverse the June 12, 1998, order of the United States Court of Appeals for the Fifth Circuit sanctioning Petitioners under Federal Rule of Appellate Procedure 38.

March 23, 1999

Respectfully submitted,

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[4]Richie makes no response to the argument at pages 9,16-17 of the Petition that, even if the Fifth Circuit's interpretation of the 1995 Act were correct, imposing sanctions based on the court's determination that its reading of that Act was "obvious" and "not arguable" was an abuse of discretion that independently justifies review.

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